(46)

No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD RUMSFELD, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER SALIM AHMED HAMDAN

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QUESTIONS PRESENTED

1. Whether the military commission established by the President to try Petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether Petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Salim Ahmed Hamdan, a citizen of Yemen who is currently detained at Guantanamo Bay.

The Respondents here and in the United States Court of Appeals for the District of Columbia are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemmingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Court of Appeals opinion (Pet. App. 1a) is reported at 415 F.3d 33 (D.C. Cir. 2005). The District Court opinion (Pet. App. 20a) is reported at 344 F. Supp. 2d 152 (D.D.C. 2004).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1), as well as §§ 1651(a), 2241(a), and 2242, and Article III of the U.S. Constitution. On December 30, 2005, H.R. 2863, a Department of Defense Appropriations Act, was enacted. Petitioner has raised with the Solicitor General a proposed briefing schedule to address the effect, if any, of that Act on this Court's jurisdiction, and is awaiting his response.

CONSTITUTIONAL, STATUTORY AND INTERNATIONAL LAW PROVISIONS

The relevant provisions are reprinted in Appendix A, *infra*.

STATEMENT

1. This case involves the intersection of laws governing courts-martial, extraordinary military commissions, and the treaties and common law that compose the "law of war."

a. In 1950, Congress codified the jurisdiction and procedures of military courts in the Uniform Code of Military Justice (UCMJ). Chapter 47, Subchapter IV, establishes the jurisdiction of courts-martial, while other subchapters establish procedures and guarantee, among other things, the right to be present at trial and confront witnesses (§ 839) and the right to independent review of military court decisions (§§ 867, 867a).

UCMJ § 836(a) permits military courts to depart from some federal court procedures, but not the UCMJ itself:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers

> practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ § 821 addresses the jurisdiction of commissions:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

The UCMJ defines only two specific offenses as triable by commission, but neither applies to this case (§§ 904, 906).

b. Military commissions apply international law to prosecute individuals for violations of the "law of war." The law of war refers to a body of international law derived from treaties and customary international law. Among the most significant treaties codifying that law are the 1949 Geneva Conventions, ratified by the United States in 1955. In particular, the Third Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) (GPW), was the product of an intensive effort after World War II. "Experience acquired during 1939-45 amply demonstrated the necessity of...provid[ing] greater and more effective protection for the persons whom they were intended to benefit." S. Exec. Rep. No. 84-9, at 1 (1955) (Ratifying Report). "The function of the new texts is to provide better protection" than the predecessor 1929 Convention and to "tighten up the obligations of the parties." *Id.* at 2.

2. In the immediate wake of treacherous violence, Congress adopted a resolution authorizing the President to "use all necessary and appropriate force" against limited targets for specified purposes. 115 Stat. 224 (2001) (AUMF). Congress did not mention commissions or declare war. Under the AUMF, armed conflict in Afghanistan began.

On November 13, 2001, despite the circumscribed AUMF, the President issued a Military Order establishing the first commissions in over fifty years. Detention, Treatment, and

Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833. The commission's ever-shifting rules are starkly different from the protections mandated in the UCMJ. *See, e.g.*, Military Commission Order No. 1 (Aug. 31, 2005). For example, they allow the accused to be excluded from portions of his trial, *id.* § 6(B)(3); permit the admission of unsworn statements in lieu of testimony, *id.* § 6(D); and allow the Secretary of Defense to terminate the proceedings, *id.* § 6(H)(1)-(6). The rules state that the limited protections afforded to defendants, including the presumption of innocence, are not "right[s]" that are in any way "enforceable," *id.* § 10, and can be withdrawn at any time, *id.* § 11.

In March 2002, counsel for Respondent Rumsfeld stated that traditional "notice and comment" procedures could not be followed because "'the need to move decisively and expeditiously in the ongoing war against terrorism' left no time for the normal procedure for writing regulations." Jess Bravin, *Military-Tribunal Defendants Get Fewer Rights and Procedural Rules*, Wall St. J., Mar. 22, 2002, at A4. The Deputy Secretary of Defense testified that a "compelling reason" to deviate from established procedures for military justice was that "commissions would permit speedy" trials. *Military Commissions, Hearing Before the Senate Armed Services Cte.*, 107th Cong. (Dec. 12, 2001) (testimony of Paul Wolfowitz).

Not a single commission trial has taken place in the four years since the 2001 attacks.

3. Over four years ago, Petitioner was captured in Afghanistan by indigenous forces while attempting to return his family to Yemen. After being turned over to American forces in exchange for a bounty, he was taken in June 2002 to Guantanamo Bay, where he was placed with the general detainee population. Pet. App. 78a. In July 2003, the President found Petitioner eligible for trial by commission. As a result, he was placed in solitary confinement from December 2003 until late October 2004 (four days before this case was argued in the district court).

In December 2003, a month after certiorari was granted in *Rasul v. Bush*, 542 U.S. 466 (2004), and pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a plea, military counsel was

appointed. Twelve days after counsel met Hamdan, he filed a demand for charges and a speedy trial under UCMJ Article 10. That demand was rejected in a legal opinion claiming that the UCMJ did not protect Hamdan. In July 2004, he was charged with a single count of conspiracy. Pet. App. 63a-67a. That charge does not allege that Hamdan committed offenses against the laws of war or that he engaged in any punishable conduct in the Afghan conflict.

4. That charge came three months *after* the Petition for Mandamus or, in the Alternative, Habeas Corpus, in this case was filed. On November 8, 2004, the district court (Robertson, J.) granted that petition in part and denied Respondents' motion to dismiss. The court rejected Respondents' demand to abstain until after the trial because Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" Pet. App. 24a (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

The district court then ruled that commissions may hear only offenses triable under the laws of war, including the Geneva Conventions; that the GPW is judicially enforceable; and that, as long as his prisoner-of-war (POW) status is in doubt, Petitioner must be tried by court-martial. Pet. App. 25a-37a. The court found it plain that the Military Order did not satisfy either the GPW or the UCMJ, particularly as it deprived Petitioner of the right to attend his trial and hear the evidence presented against him. *Id.* at 37a-47a. This placed the President in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Pet. App. 28a.

5. On the government's appeal, the court of appeals reversed in a partially divided opinion written by Judge Randolph and joined by then-Judge Roberts (in full) and Judge Williams (in part). The panel first rejected abstention, finding that its rationales, comity and speed, "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." *Id.* at 3a (citing *Ex parte Quirin*, 317 U.S. 1 (1942)). Under *Abney v. United States*, 431 U.S. 651, 662 (1977), abstention would be inappropriate because "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not

to be tried by a tribunal that has no jurisdiction." *Id.* at 4a.

On the merits, the court held that the AUMF and UCMJ authorized commissions. *Id.* at 5a-7a. It also held that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), precluded the GPW's judicial enforcement, although it acknowledged that *Eisentrager* involved the 1929 Convention and that it reached the question in an "alternative holding." *Id.* at 7a-10a.

With respect to Common Article 3 of the Convention, which requires "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable," the court found the conflict with al Qaeda exempt. *Id.* at 12a-13a. Judge Williams concurred, disagreeing with this holding because "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." *Id.* at 18a.

6. On November 7, 2005, this Court granted certiorari.

SUMMARY OF ARGUMENT

This case involves a critical question regarding the allocation of power among Congress, the President and the federal courts in the ongoing "war on terror." The President has claimed the unilateral authority to try suspected terrorists wholly outside the traditional civilian and military judicial systems, for crimes defined by the President alone, under procedures lacking basic protections, before "judges" who are his chosen subordinates. He has further asserted the power to disregard treaty obligations that Congress has ratified and the federal courts repeatedly have enforced, obligations that protect not only Hamdan but also American servicemembers. Such assertions reach far beyond any war power ever conferred upon the Executive, even during declared wars. The court of appeals' limitless approval of this unprecedented arrogation of power must be reversed.

I. In this case, the President seeks not to revive, but to invent, a new form of military jurisdiction. While military commissions have served an important role in times of war, their use has been strictly limited in light of their inherent threat to liberty and the separation of powers. Accordingly, this Court has never before recognized the legitimacy of a

commission except to the extent it has been specifically authorized by Congress. And even in the few cases where this Court has found congressional authorization, this Court has always construed the commissions' jurisdiction as limited by the treaties and traditions constituting the law of war, absent express statutory provisions to the contrary.

In this case, the commissions established by the President transgress *both* boundaries. 10 U.S.C. 821 clearly provides that commissions at most may try "offenders or offenses that by statute or by the law of war may be tried by military commissions." Likewise, the AUMF only permits the use of "necessary and appropriate force." To construe that phrase as authorizing commissions that try offenses, much less offenses unrecognized by the law of war, in a forum far removed in time and distance from any battlefield, and without important procedural safeguards, would provide to the President an almost limitless authority that Congress could not have intended and that threatens our divided government. If in the interest of "national security," this Court concludes that the President has such authority, it will be hard pressed to limit, in any principled manner, the President's assertion of similarly unprecedented powers in other areas of civil society, so long as they purport to serve that same objective. Indeed, it is not hard to imagine a future President invoking this case as precedent, and asserting the need to subject American citizens to military commissions for any offense somehow connected to the "war on terror."

To avoid such dangers, even when Congress has authorized commissions, this Court has always construed that authority to be limited to trying offenders and offenses subject to commission trial under the law of war. It should adopt the same approach in this case and conclude that, even if some form of commission has been authorized, the commission created by the President here is unlawful. First, the commission fails to provide procedural protections required by statute, and long deemed essential to the legitimacy of military tribunals enforcing the law of war. Under 10 U.S.C. 836(a), Congress prohibited the use of procedures in commission trials that are "contrary to or inconsistent with" the UCMJ. Despite this express

restriction, the government acknowledges that the commission procedures do not afford essential UCMJ protections, including the right to be present during the proceedings (§ 839(b)). Second, Petitioner is not an offender subject to commission trial under the law of war. To the extent the government argues that petitioner is triable by commission because the conflict with al Qaeda is subject to the law of war, it must also acknowledge that he is entitled to the protection of the law of war, including the provisions of the Geneva Convention that prohibit commission trials.

Moreover, the law of war does not, in fact, extend to the offense with which Hamdan has been charged. Hamdan's single count of conspiracy has never constituted an offense against the law of war. Nor has the law of war ever been extended to acts of terrorism when they occur outside of a traditional battlefield in a declared war between nation-states. Instead, such crimes have long been tried, with nearly uniform success by the government, in civilian courts. If the American people have lost faith in their judicial institutions and have determined to abandon that tradition, that step must be taken clearly and deliberately by Congress, not through an assertion of unilateral power by the President.

II. The judgment below must be reversed for a further, independent reason. This is the first commission since ratification of the GPW in 1955. Hamdan—apprehended on the field of battle in a war between the United States and the government of Afghanistan, both signatories to that treaty—is entitled to its protections, which form an essential component of the law of war. Under the GPW, until a "competent tribunal" determines that Hamdan is not a POW, he is entitled to its protections. One such protection is the right to be tried before the same tribunal as American servicemembers charged with the same offense. The government does not dispute that this requires trial before a court-martial, with all the attendant procedural protections afforded American servicemembers that commissions deny.

The court of appeals erred further in concluding that Common Article 3 of the GPW does not protect Hamdan. That Article is a minimum baseline that applies to all conflicts. In the end, the President cannot claim that the

criminal offenses of the laws of war apply to the war on terror, and at the same time deny the accused the right to invoke any of the protections of the laws of war.

Finally, the court of appeals erred in concluding that rights protected by the GPW could not be judicially enforced. In this case, the rights at issue are part of the laws of war, and thereby constrain any authorization of a commission. Moreover, they have been codified in statutes and regulations, which are independently enforceable in habeas and mandamus actions.

III. Hamdan does not challenge the President's power to use troops or his power to temporarily detain true enemy combatants. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). He challenges the *further* assertion of power to subject detainees to *ad hoc* trials. Unlike forward-looking detentions—which implicate war powers and where courts lack comparative expertise—tribunals that look retrospectively at guilt intrude on areas where civilian courts have competence and protect our Constitution's checks and balances. *E.g., In re Yamashita*, 327 U.S. 1 (1946); *Quirin*, 317 U.S. 1; *United States v. Grimley*, 137 U.S. 147 (1890); *Ex parte Milligan*, 71 U.S. 2 (1866).

Nor does Hamdan challenge the government's right to try him for offenses proscribed by law in a civilian court or court-martial, under protections long considered fundamental to the legitimacy of *any* American court. And Hamdan does not challenge the authority of *Congress* to alter the traditional jurisdiction of civilian and military courts, subject to constitutional constraints. But in the absence of such a decision by the legislative branch, the President may not displace the jurisdiction of those regularly constituted courts and disclaim the treaty obligations to which Congress has committed the nation.

This is the rare case where invalidating the government's action preserves the status quo, a carefully crafted equilibrium in place for many decades. Our fundamental principles of separation of powers have survived many dire threats to this nation's security—from capture of the nation's capital by enemy forces, to Civil War, to the threat of nuclear annihilation during the Cold War—and those principles must not be abandoned now.

ARGUMENT

I. PETITIONER'S COMMISSION IS NOT AUTHORIZED

A. Military Commissions Play A Limited Role in the Nation's Constitutional Structure and Tradition

This Court has repeatedly recognized that "the Framers harbored a deep distrust of executive military power and military tribunals." *Loving v. United States*, 517 U.S. 748, 760 (1996); *Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."). The traditions of this country favor civilian courts and courts-martial, not commissions, for the prosecution of war crimes.

Civilian Criminal Trials. Since the Founding, Congress has used civilian trials to address violence against Americans from stateless organizations, beginning with piracy and continuing to the present. 18 U.S.C. pt. 1, ch. 113B. In the aftermath of September 11, Congress enacted legislation to ensure the adequacy of civilian law enforcement agencies and the criminal justice system to respond to the modern threat of terrorism. USA PATRIOT Act, 115 Stat. 272 (Oct. 26, 2001). Congress also revised criminal statutes for offenses triable in federal court. *E.g.*, 18 U.S.C. 1993, 2331, 2339C, 2339D. Federal criminal laws have helped convict numerous terrorists, including those involved in the 1993 World Trade Center and the 1995 Oklahoma City bombings. These federal charges are available to try Petitioner and others. Accused 'dirty bomber' Jose Padilla has now been indicted on criminal charges in a federal civilian court.

Courts-Martial. Military courts have played an important but limited role. The traditional military court is the court-martial, a body that has long had jurisdiction to try service-members. In the 20th century, Congress gave courts-martial jurisdiction over violations of the laws of war. 10 U.S.C. 818.

Military Commissions. The jurisdiction of commissions has always been strictly confined. They have been permitted only as courts of necessity, convened temporarily by commanders in zones of active military operations and used

to try war crimes or enforce justice in occupied territory when no other courts were open or had jurisdiction. 2 WINTHROP, MILITARY LAW & PRECEDENTS 831 (2d ed. 1920).

Commissions were thus used on the battlefields of the Mexican-American war, but only "until Congress could be stimulated to legislate on the subject." 2 MEMOIRS OF LIEUT.-GENERAL SCOTT 392-93 (1864). They were used again during the Civil War, but subject to the "general rule" that they be used "only for cases which cannot be tried by a court-martial or by a proper civil tribunal." 1 THE WAR OF THE REBELLION 242 (2d Series 1894); Lieber Code, Gen. Order No. 100, *in* THE LAWS OF ARMED CONFLICT 3 (1988) (stating that commissions can only try offenses with no "jurisdiction conferred by statute on courts-martial"); *In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4303) (Nelson, J.) (invalidating commission because "all authorities agree that it can be indulged only in case of necessity....This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power."); *Madsen v. Kinsella*, 343 U.S. 341, 348, 355 (1952) (upholding commissions used overseas as a temporary court system in occupied territory).

Petitioner's commission does not fall within any of these traditional uses of commissions. Among other things, it was convened at Guantanamo Bay, which is neither a zone of combat nor occupied territory. Even *Quirin*, which marked the absolute outer bounds of the commissions used in World War II, recognized that war crimes tribunals have been exceptionally limited by constitutional tradition, specific legislation, and the laws of war. Here, however, the President has given the commission a jurisdiction that far exceeds any ever previously exercised.

B. Military Tribunals Must Be Strictly Limited

Concerns over the justice system and role of the military during the rule of King George III were grievances leading to the founding of this Nation. *See* DECLARATION OF INDEPENDENCE para. 11, 14, 20, 21 (U.S. 1776) (charging that the Crown had "affected to render the Military independent of and superior to the civil power"; "depriv[ed] us, in many cases, of the benefits of Trial by Jury"; "made Judges

dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended offences."). This Court has recognized that commissions, which concentrate judicial functions into Executive hands in times of war when civil liberties are most imperiled, are fundamentally at odds with divided government and so must be used only out of great necessity. *Milligan*, 71 U.S. at 124 ("Martial law, established on such a basis [for military convenience], destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power.'").

Accordingly, "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts," *Reid v. Covert*, 354 U.S. 1, 21 (1957). While *Reid* commanded a plurality, a majority soon extended it to noncapital crimes when "critical areas of occupation" were not involved. *Kinsella v. Singleton*, 361 U.S. 234, 244 (1960).

In order to guard against the unauthorized extension of the jurisdiction of military tribunals, this Court repeatedly reviews challenges to their jurisdiction and strikes down those that transgress statutory and constitutional limits. *See, e.g., Milligan*, 71 U.S. at 120-27 (commission may not try civilian charged with conspiracy and other violations when civilian courts remain open); *Duncan v. Kahanamoku*, 327 U.S. 304, 313, 324 (1946) (invalidating commission when civilian court able to function). Indeed, as the court of appeals acknowledged, *Quirin* provides "a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." Pet. App. 3a.

C. Congress Must Authorize Military Commissions

The Constitution vests Congress with the power to create commissions and define their limits. Article II establishes the President's title as "Commander in Chief," but Article I, § 8 specifically grants Congress the power to "constitute Tribunals inferior to the supreme Court," "define and punish

...Offences against the Law of Nations," "declare War," "make Rules for the Government and Regulation of the land and naval Forces" and "disciplin[e] the Militia."

Citing this language, *Quirin* and *Yamashita* held that the authority to establish commissions rests with Congress:

> *Ex parte Quirin*...pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish... Offenses against the Law of Nations...," of which the law of war is a part, had by the Articles of War [ ] recognized the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Yamashita, 327 U.S. at 7 (citation omitted); *see also Quirin*, 317 U.S. at 28-29; *Toth*, 350 U.S. at 14 ("this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief"); Federalist No. 47, at 301 (Rossiter ed. 1961) (J. Madison); *Wiener v. United States*, 357 U.S. 349, 355 (1958); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952).[1]

"There are powerful reasons for construing constitutional silence on [a] profoundly important issue as equivalent to an express prohibition." *Clinton v. New York*, 524 U.S. 417, 439 (1998). While the use of force requires unity and dispatch, the process of justice requires more than a military judiciary serving at the pleasure of the President. Here, the President exercises "legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of

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[1] *Milligan* split 5-4 on whether *Congress* could create commissions, *see* 71 U.S. at 136-37 (Chase, C.J.), but was unanimous that the President could not do so himself. *Id.* at 120 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.")

governmental powers." *Reid*, 354 U.S. at 39 (plurality).

D. Congress Has Not Authorized Petitioner's Commission

The court of appeals held that Congress had authorized the commission in the AUMF and two long-standing UCMJ provisions, 10 U.S.C. 821, 836(a). *See* Pet. App. 5a-6a. None of these provisions authorize a commission; nor do they authorize the President to employ tribunals unfettered by tradition or the law of war. To whatever extent Congress *may* lawfully create commissions, none of the three statutes invoked by the President may be read to do so.

Sections 821 and 836(a). The court of appeals erred in holding that these provisions authorized this commission. At most, the provisions acknowledge that the President may, on occasion, be authorized to establish commissions, but *restrict* how the President may implement that authority.

10 U.S.C 821 makes clear that the UCMJ does not itself deprive an otherwise valid commission of its traditional jurisdiction. Unlike other contemporaneous provisions, such as 10 U.S.C. §§ 818, 904, 906, it does not confer any jurisdiction. Before § 821 is read to authorize a tribunal to mete out death sentences and life imprisonment, particularly one that lacks traditional constraints on executive authority and protections traditionally conferred upon the accused, a clear legislative statement is necessary.[2]

To the extent this provision can be read to sanction the

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[2] *See Amicus Br. of Richard Epstein et al.*, at 4-12.; *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas...[a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (internal quotations and citation omitted); *Valentine v. Neidecker*, 299 U.S. 5, 9 (1936) ("the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law"); *Caldwell v. Parker*, 252 U.S. 376, 385 (1920)(requiring a "direct and clear expression of a purpose on the part of Congress...to bring about, as the mere result of a declaration of war...the extraordinary extension of military power....Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted"); *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) (stating that the legislative and executive branches cannot informally "reallocate their own authority").

use of commissions, it necessarily limits that authority to the trial of "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. 821. That is precisely how this Court interpreted similar statutory language. *See Quirin*, 317 U.S. at 28-29; *Amicus Br. of the Brennan Center for Justice & William Eskridge*, at 15-23.

Nor is § 836(a) authority for the commission. It simply authorizes the President to issue regulations for the conduct of military trials. It does not authorize their establishment or define their jurisdiction. To the contrary, the provision specifically withholds from the President the power to define offenses triable by commissions, giving him instead only the authority to establish the "procedures" by which the offenses defined elsewhere may be tried. *Id.* And even then, the authorization is limited, precluding procedures "contrary to or inconsistent with this chapter." *Id.*

The AUMF. The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224. Determined not to provide the President "a blank check,"[3] Congress reserved from the President the full range of powers that accompany a Declaration of War.[4]

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[3] 147 Cong. Rec. H5655 (2001) (statement of Rep. Smith); *id.* at H5663 (AUMF "not a carte blanche for the use of force") (Rep. Schakowsky); S9949 ("It was not the intent of Congress to give the President unbridled authority...to wage war against terrorism") (Sen. Byrd); S9951 (similar) (Sen. Levin); H5654 (Rep. Smith); S9416 ("[W]ords in earlier drafts of this joint resolution, which might have been interpreted to grant a broader authority to use military force, were deleted") (Sen. Levin); S9417 (AUMF "does not give the President a blanket approval to take military action...It is not an open-ended authorization to use force in circumstances beyond those we face today.") (Sen. Kerry); H5671 (AUMF "not unlimited") (Rep. Udall); H5675 (AUMF "narrow") (Rep. Jackson); S9417 ("does not contain a broad grant of powers") (Sen. Feingold).

[4] 147 CONG. REC. H5638, H5680 (2001) ("By not declaring war, the resolution preserves our precious civil liberties"; "declarations of war

The object of the AUMF was to authorize military action.[5] It said nothing about criminal punishment. In *Quirin*, even the Declaration of War was not enough to authorize a commission; the Court relied instead on other statutes. *See supra* p. 12. If commissions qualify as a "use [of] force," then those words permit any action the President believes related to terrorism, however tangential. Indeed, the President has, in this case and elsewhere, claimed precisely such unlimited powers under his broad reading of the AUMF.

A plurality of this Court recently rejected the idea that "a state of war" can be "a blank check for the President," *Hamdi*, 542 U.S. at 536. It reached that conclusion in the far less onerous context of detention. *Id.* at 518 (citing sources for the proposition that "[c]aptivity in war is 'neither revenge, nor punishment'" and "'merely a temporary detention which is devoid of all penal character'"); *id.* (referring to "mere detention"); *id.* at 523 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be *detained* in such circumstances") (emphasis added). *But see id.* at 518 (describing history that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,' *Ex parte Quirin*, 317 U.S. at 28," but avoiding discussion of what body today must try unlawful combatants).[6] It is

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trigger broad statutes that...authorize the President to apprehend 'alien enemies.'") (Rep. Conyers); S9418 ("If this is indeed to be a war, then the President should seek a declaration of war.") (Sen. Feingold); H5646 ("We do not make a formal declaration of war today.") (Rep. Hoyer); H5662 (Rep. Davis); H5673 ("I would have strong reservations about a resolution authorizing the use of force in an open ended manner....This is not that resolution.") (Rep. Wu); H5653 ("We need a declaration of war" to "[g]ive the President the tools, the absolute flexibility he needs") (Rep. Barr).

[5] *See* 147 CONG. REC. H5646 (2001) ("[W]e authorize the President to use all necessary and appropriate military force") (Rep. Schiff); H5644 (Rep. Roukema); H5666 (Rep. Cardin); H5672 (Rep. Portman).

[6] Justice Thomas' dissent was carefully confined to detention, mentioning the term or its derivation at least forty-six times. *See Hamdi*, 542 U.S. at 578-98 (Thomas, J., dissenting). Justice Thomas found *punishment* to stand on entirely different footing, isolating *Milligan*: "More importantly, the Court referred frequently and pervasively to the criminal

wholly consistent with wartime precedent to interpret the AUMF as authority for one thing (detention) but not another (trial and punishment). "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose and 'at peace' for another"; the "attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history." *Lee v. Madigan*, 358 U.S. 228, 230-32 (1959).

Even if "force" were stretched to mean something it does not, the AUMF only authorizes "necessary and appropriate" force. The government has not shown that resurrecting a tribunal eschewed in Korea and Vietnam (and which four years after the September 11 attacks has not even completed one trial) is somehow necessary or appropriate, let alone both. The *Hamdi* plurality held that "detention of individuals ...is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[7] But the AUMF's language does not give the President unchecked authority to determine what is "necessary and appropriate."[8]

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nature of the proceedings instituted against Milligan...the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 593 (citations omitted). Commissions, in contrast, "implicate...the two primary objectives of criminal punishment: retribution or deterrence" and "affix culpability for prior criminal conduct." *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997); *Hamdi*, 542 U.S. at 556-57 (Scalia, J., dissenting).

[7] 542 U.S. at 518. The decision looked to the GPW to provide guidance on what types of force were "necessary and appropriate." *Id.* at 521.

[8] The AUMF is narrower than previous congressional authorizations of force. Shortly after passage of the AUMF, Congress passed the Iraq Force Resolution, which authorized the President to "use the Armed Forces of the United States as *he determines* to be necessary and appropriate." 116 Stat. 1498 (2002) (emphasis added). *See also, e.g.*, 1 Stat. 95, 96 (1789 (first militia statute, authorizing President to use militia against Indians "as he may judge necessary"); 2 Stat. 130 (1802) (authorizing such use of "the armed vessels of the United States as may be judged requisite by the President" against Barbary pirates); 3 Stat. 471 (1811) (permitting President, in conflict with Spain, to "employ any part of the army and navy of the United States which he may deem necessary"); 78 Stat. 384 (1964) (Gulf of Tonkin Resolution stating that "Congress approves and supports the determination of the President...to take all necessary measures to repel any armed attack").

The Court has never considered an expansion of military jurisdiction that displaces traditional tribunals to be a "necessary" aspect of military operations. *Reid* rejected a similar argument by *both* the President and Congress regarding the Constitution's "Necessary and Proper" Clause, calling it a "latitudinarian interpretation...at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." 354 U.S. at 30; *Amicus Br. of General Brahms et al.*

Finally, assuming that "force" includes military tribunals, the AUMF only permits action necessary "to prevent" terrorism. Compare Br. Opp. at 22 (commission serves retributivist purpose). In light of Respondents' separate claim of power to detain Hamdan indefinitely as an enemy combatant, the burden can only be met if his trial serves general deterrence.[9] Terrorists fear being killed by our Armed Forces and intelligence community. If they cannot deter a terrorist, it is far-fetched to think that a prosecution of Hamdan at Guantanamo five years after his supposed crime would do so. Nor is it credible to suggest that a commission is "necessary" to "prevent" terrorism. After all, if Hamdan's prosecution promotes deterrence, it can take place in an Article III court or a court-martial. Both are authorized, available, and could have taken place years ago.

It is the Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted). Congress passed a resolution circumscribed in scope, purpose, and effect; its words do not authorize commissions. This Court has never

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[9] The AUMF does not appear to contemplate general deterrence. Congress adopted the AUMF in lieu of a proposed White House Resolution that would have given the President the power "to deter and pre-empt any future acts of terrorism." 147 CONG. REC. S9951 (2001). Congress instead used the circumscribed "prevent" instead of broader "deter" language. Otherwise, the President could order assassinations of foreign leaders and a "little old lady in Switzerland," *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (2005), tangentially connected to terrorism. Furthermore, there is no evidence that legislators thought commissions "necessary and appropriate." If anything, they expressed a desire to use civilian trials. *E.g.*, 147 CONG. REC. H5680 (Rep. Conyers).

found that the laws of war supplant open civil and military courts when only "force" was authorized. Nor have other Presidents claimed as much. Here, the conflict in which the commission has been convened (the so called "war on terror") is not even tethered to a specific nation-state, location, or time period. Even if a limited authorization for military action such as the AUMF is sufficient to authorize a traditional commission to try traditional war crimes, that is not at all what the President has undertaken in this case.

E. This Court Should Enforce the Jurisdictional Limits of Military Commissions

Even if this Court were to conclude that the President possesses some inherent authority to convene military commissions, or that Congress has implicitly authorized their use, that authority must be strictly confined to safeguard liberty and our constitutional division of authority between the executive, legislative, and judicial branches. This Court has thus long construed authorizations for commissions to allow the President at most to employ them in accordance with their traditional use.

Accordingly, *Duncan* refused to read the "Organic Act," establishing the territorial Hawaiian government, to permit military courts to supplant civilian ones in World War II:

> [The Founders rejected placing] in the hands of one man the power to make, interpret and enforce the laws....We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power...which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that act, therefore,...was not intended to authorize the supplanting of courts by military tribunals.

327 U.S. at 322, 324. Although Hawaii was "under fire" and a "battle field," *id.* at 344 (Burton, J., dissenting), the Court embraced *Milligan*'s strict confinement of military tribunals, just four years after *Quirin*.

To hold otherwise would pose grave risks to liberty and the careful balance of legislative, executive and judicial power established under our Constitutional system:

> With the known hostility of the American People to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.

Coleman v. Tennessee, 97 U.S. 509, 514 (1878); *see also Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("[T]he allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."); *Lincoln v. United States*, 197 U.S. 419, 427-28 (1905) (Holmes, J.) (rejecting claim that the "President's order" to tax goods "was a lawful exercise of the war power" because the statute "was not a power in blank for any military occasion").

F. Petitioner's Commission, By Ignoring Statutory and Common Law Constraints, Exceeds Any Possible Authorization Provided By Congress

The commissions created by the President fail to provide essential protections long afforded under the law of war and mandated in the UCMJ and Geneva Conventions.

1. *The Commission Violates Specific Statutory Restrictions*

Evading the procedures used in courts-martial has never been an acceptable rationale justifying the use of military commissions. The court of appeals radically extended this Court's jurisprudence by permitting wide-ranging procedural deviations once the Executive labels his tribunal a "commission." That has never been the law.

a. Commissions from the days of General Scott, *supra*, have applied court-martial procedure. General Order 1 in the Civil War likewise required them to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial *in order to prevent abuses which might otherwise arise*." WAR OF THE REBELLION, *supra*, at 248 (emphasis added). Even with these safeguards, *Milligan* found commissions impermissible.[10]

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[10] Historical practice, legal commentary, and military regulations all

10 U.S.C. 836(a) codifies the longstanding requirement of consistency between commissions and courts-martial; it precludes the President from employing procedures in commissions that are "contrary to or inconsistent with" the UCMJ. It states that if Hamdan is merely "triable" in a court-martial, the UCMJ cannot be set aside. A commission that circumvents the procedural requirements of the UCMJ "exceeds the President's authority." *United States v. Douglas*, 1 M.J. 354, 356 (C.M.A. 1976). Because Hamdan's commission concededly does not conform to the procedures applied in courts-martial, it is unlawful. *See Amicus Br. of Military Law Historians; Amicus Br. of National Institute for Military Justice.*

10 U.S.C. 821 confirms this conclusion. Its drafter, General Crowder, stated it "just saves to these war courts...a concurrent jurisdiction with courts-martial...Both classes of courts have the same procedure." S. Rep. 64-130, at 40-41. Congress' use of the term "concurrent" jurisdiction *limits* commissions. The Court has held, for example, that the Tucker Act's grant of "concurrent jurisdiction" to district

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confirm that commissions follow court-martial rules. *E.g.*, WINTHROP, *supra*, at 841-42 ("[A]s a general rule and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will–like a court-martial–...ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence."); ROLLIN IVES, TREATISE ON MILITARY LAW 284 (1879) ("The forms of procedure...are the same as before courts-martial."); Manual for Courts Martial, prmbl. Pt. 2(b)(2) (2000) ("military commissions...shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.").

For instance, JAG review invalidated a commission under Article of War 65. The Article prohibited the convening officer to charge, but its text only referenced courts-martial. 4 Stat. 417 (1830). Nevertheless, the Judge Advocate General agreed that the Article had been violated and disapproved the proceedings. Joseph Holt to Gen. John Pope (Nov. 3, 1863), *quoted in* Chomsky, *The United States-Dakota War Trials*, 43 STAN. L. REV. 13, 43 (1990). *See also* Mem., Procedural Law Applied by Military Commissions (National Archives, Legal Division Gen. D. MacArthur) ("If the conduct of military commissions in the past is to be a guide, the same rules for procedure and rules of evidence governing General Courts Martial would prevail."), *quoted in* Evan Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, 2003 ARMY LAW. 18, 31 n.118.

courts limits those courts.[11] Otherwise, litigants would "forum-sho[p]." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Just as rule parity prevents litigants from forum-shopping their Tucker Act claims, parity here prevents the "abuses which might otherwise arise." Civil War Order 1, *supra*.

b. The commission's procedures are avowedly "contrary to or inconsistent with" the procedural protections afforded by the UCMJ and by historical practice. 10 U.S.C. 836(a). For example, the proceedings can "exclude the Accused." Mil. Order No. 1 § 6(B)(3). As the district court concluded, this rule, which has already been used to bar Hamdan's presence, is fatally inconsistent with 10 U.S.C. 839(b).[12] Pet. App. 47a. That provision protects the fundamental rights to be present throughout trial and to confront witnesses. Under § 839(b), except for voting and deliberation, "[a]ll other proceedings...shall be in the presence of the accused." *See United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at all stages of his trial");

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[11] *United States v. Sherwood*, 312 U.S. 584, 591 (1941) (the Act "did no more than authorize the District Court to sit as a court of claims"); *Bates Mfg. Co. v. United States*, 303 U.S. 567, 571 (1938); *United States v. Jones*, 131 U.S. 1, 19 (1889) ("We cannot yield to the suggestion that any broader jurisdiction as to subject matter is given to the Circuit and District Courts than that which is given to the Court of Claims. It is clearly the same jurisdiction-'concurrent jurisdiction' only."); *DeCecco v. United States*, 485 F.2d 372, 374 (1st Cir. 1973); *Warren v. United States*, 94 F.2d 597 (2d Cir. 1938) (because claims court could not hear suits for treaty violations, neither could district court); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) ("concurrent jurisdiction" in federal question statute shows Congress "did not intend to invest its courts with any new and strange jurisdictions").

[12] Several commission procedures are contrary to the UCMJ on their face. Commission rules do not permit independent review, contrary to §§ 867 and 867a. The final decision lies with the President. Mil. Order No. 1 § 6(H)(6). Similarly, § 6(D)(1), permitting admission of evidence so long as it has "probative value to a reasonable person," conflicts with §836(a), which requires the rules of evidence generally to conform to those in the District Courts. The commission rule permits, for example, testimony obtained by torture. *See Amicus Br. of Human Rights First.*

The panel also relied on *Madsen*, but the UCMJ took effect after Madsen's trial. 343 U.S. at 345 n.6. And Madsen did not challenge commission procedures. *Id.* at 342. Strikingly, her commission guaranteed her "the rights ... [t]o be present" and "cross-examine any witness." *Id.* at 358 n.24.

United States v. Daulton, 45 M.J. 212, 219 (C.M.A. 1996) (witness testimony). In fact, JAG review in the Civil War led to the dismissal of a commission for violation of this right. See *infra* p. 24; *Amicus Br. of American Jewish Congress et al.*[13]

Apart from § 839, the common law (which binds military commissions) requires the accused to be present. *See Diaz v. United States*, 223 U.S. 442, 455 (1912) ("[O]ur courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial...*and as being scarcely less important to the accused than the right of trial itself.*") (emphasis added); *Lewis v. United States*, 146 U.S. 370, 372, 375 (1892) (right of presence at *voir dire* is of "peculiar sacredness" required by "the dictates of humanity"); *Dean*, 13 M.J. at 678; *Daulton*, 45 M.J. at 219. Customary international law also guarantees an accused the right to be "tried in his presence." Prot. I, Geneva Conventions relating to Protection of Int'l Armed Conflict, art. 75(4)(e) (1977) (Protocol I).

Similarly, this Court has held that "a criminal trial is not just unless one can confront his accusers." *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988). Although the right to confront witnesses is reflected in the Sixth Amendment, it has a genesis in natural law and has been recognized as essential in military courts and international law. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.'") (quoting *State v. Webb*, 2 N.C. 103 (1794)); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Daulton*, 45 M.J. at 219; Protocol I, art. 75(4)(g) (guaranteeing accused's right "to examine, or have examined, the witnesses against him"). Our Government, in fact, took the position during World War II that conducting a commission without the participation of the accused was a punishable violation of

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[13] After Hamdan filed his Certiorari Petition, the Government made some semantic changes to commission procedures. Pet. Br. App. 46a, 59a. Yet both old and new rules permit Hamdan's exclusion if "protected"—a category far broader than "classified"—information is considered. *Compare* 32 C.F.R. § 9.6(b), *with* § 6(D)(5)(b). The Government offers no authority to suggest that its new iteration of rules is consistent with the UCMJ.

the laws of war. Wallach, *supra*, at 45-47.

In the face of this precedent, the Government has offered no authority that permits a commission to be convened without rights of presence and confrontation. Nor have they offered anything to suggest that Congress has authorized a commission whose own procedures violate the laws of war.

c. Yet the panel below held that the President is free to dispense with virtually the entire UCMJ except in the rare instances where the words "military commission" explicitly appear. Pet. App. 15a. This holding reads out of existence the express language of § 836(a) and yields absurd results. Only three procedural rules in the UCMJ mention "military commissions": § 828 (requiring a court reporter); § 849(d) (permitting deposition testimony), and § 850(a) (permitting admission of prior sworn statements). The remaining places where the words appear are jurisdictional or refer to non-procedural rules. *See, e.g.*, §§ 821, 847-48, 904, 906. The panel concluded that Congress deliberately placed constraints through § 836(a), but limited those constraints to court reporters, depositions and affidavits.[14] The UCMJ's text and stated purpose belie such a notion, for it "covers both the substantive and the procedural law governing military justice," S. Rep. No. 81-486, at 1 (1949) ("Purpose of the Bill").

In effect, the panel replaced the UCMJ with the old Articles of War from *Yamashita*. Article 2 of those Articles did not extend procedural protections to persons facing commissions. *Yamashita*, 327 U.S. at 19-20. But as the district court held, the UCMJ supplanted *Yamashita*. Over the Army JAG's objection, it broadened Article 2 to include both "prisoners of war" and "persons within an area leased by or otherwise reserved or acquired for the use of the United

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[14] It would be highly peculiar for Congress to choose to regulate depositions and court reporters if it was Congress' intent to leave commissions otherwise deregulated. In the face of the clear language of § 836(a), the far more plausible explanation is that Congress' omission of the words "military commissions" from certain procedural rules in the UCMJ reflected the historical understanding of symmetry in procedure.

Indeed, the UCMJ fails to mention "courts-martial" in numerous sections, yet it is clear that those provisions nonetheless apply. *See, e.g.*, §§ 807, 813, 830. For example, 10 U.S.C. 855 forbids a court-martial from punishing through "flogging" or "branding."

States." § 802(a)(9), (10), (12); Pet. App. 42a-43a; Statement of Gen. Green, Sen. Armed Serv. Comm., May 9, 1949, at 266.

d. The President's commission also flouts other statutory commands. To take two examples, 10 U.S.C. 3037(c) provides:

> The Judge Advocate General...shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority." LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 124 (2005). In the Civil War, JAG review led to invalidation of many commissions, including for denial of the right to be present.[15] Hamdan *has already been denied* this basic right. Pet. App. 45a. But the Military Order cuts the presidentially appointed and Senate-confirmed JAG out entirely.

Moreover, Congress has prohibited having non-citizens subject "to different punishments, pains, or penalties, on account of such person being an alien." 18 U.S.C. 242. This statute forbids "being subjected to different punishments, pains or penalties by reason of alienage...than are prescribed for the punishment of citizens." *United States v. Classic*, 313 U.S. 299, 326 (1941). No past commission, including *Quirin* itself, excluded citizens by design.[16]

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> [Judge Advocate General Holt] repeatedly overturned the decisions of trials by military commission (as well as courts-martial) for what can only be called legal technicalities...Holt reviewed the sentence of Mary Clemmens...[stating]: "Further, it is stated that the Commission was duly sworn—but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her. These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court Martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

MARK NEELY, THE FATE OF LIBERTY 162-63 (1991) (quoting Holt's opinion).

16 A separate statute, 42 U.S.C. 1981, contains a similar ban. Yet the Military Order funnels non-citizens, and only non-citizens, through this separate and unequal system. This discrimination explains why Congress cannot easily reverse the panel, and highlights the role of this Court. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply

2. *Petitioner Is Not An Offender Triable By Commission*

As discussed in Part II, *infra*, because Petitioner was captured on the battlefields of Afghanistan and claims POW protection, the law of war requires that he be afforded the protections provided to an American servicemember. Because Congress has not authorized the President to employ commissions that contravene the law of war, this commission lacks jurisdiction to try Petitioner.

This case is thus unlike *Quirin*, where the saboteurs (who shed their uniforms and admitted arriving with explosives) did not contest their unlawful combatant status. *See* 317 U.S. at 46 (commission appropriate "upon the conceded facts"); *Ex parte Endo*, 323 U.S. 283, 302 (1944) (detention not authorized "in case of those whose loyalty was not conceded or established"). But, as here, "where those jurisdictional facts are *not* conceded—where the petitioner insists that he is *not* a belligerent—*Quirin* left the pre-existing law in place." *Hamdi*, 542 U.S. at 571-72 (Scalia, J., dissenting).

This case is far closer to that pre-existing law of *Milligan* than it is to *Quirin*. Respondents call Milligan a "civilian," but the Government told the Court then that he was an unlawful belligerent who "conspired with and armed others."[17] Respondents' attempt to downplay *Milligan* is also

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legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

These difficulties are exacerbated because judicial decisions that transfer unintended powers to the President, like the opinion below, are difficult to correct when no trials have concluded and a bicameral supermajority is required. *See* U.S. Const., art. I § 7, cl. 2 (veto override); White House, Statement of Policy, July 21, 2005 (stating that the AUMF provides all the authority the President needs and recommending veto of a bill governing detention and trial of enemy combatants).

[17] Lambdin Milligan was charged with: 1. 'Conspiracy against the Government of the United States;' 2. 'Affording aid and comfort to rebels against the authority of the United States;' 3. 'Inciting insurrection;' 4. 'Disloyal practices;' and 5. 'Violation of the laws of war.' 71 U.S. at 6. The Government claimed that "These crimes of the petitioner were committed within...a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize...where ... the

undermined by post-*Quirin* reliance on it in *Duncan*, 327 U.S. at 322, and *Reid*, 354 U.S. at 30 (plurality) (*Milligan* remains "one of the great landmarks in this Court's history").

Finally, this commission takes place outside of occupied territory or a zone of war, deviations from practice that Congress would not have anticipated and that this Court has not approved. *Milligan*, 71 U.S. at 127 ("confined to the locality of actual war."). Geographic limitations on jurisdiction ensure that commissions are used out of necessity, not to avoid procedural protections.[18] *Reid*, for

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petitioner conspired with and armed others." *Id.* at 17 (reprinting United States' argument) (emphasis added). *See also id.* at 130 (majority op.); *id.* at 132 (Chase, C.J., concurring); *Hamdi*, 542 U.S. at 566 (Scalia, J., dissenting).

The assertions in Hamdan's charge, by contrast, fail even to allege that he committed a crime during war. Conspicuously absent is any statement of when the supposed violation occurred. For a commission to have jurisdiction, it must be established that the crime was committed in a war.

Unlike Mr. Milligan, Petitioner has not even been charged with, let alone convicted of, conspiring to seize arsenals and release POWs. Even still, *Milligan* unanimously read Congress's silence to constitute lack of authorization. *See Milligan*, 71 U.S. at 122 ("Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them.").

Furthermore, the charges in *Quirin* were statutorily authorized to be tried by commission. Charges 2 and 3 were violations of Articles of War 81 and 82, now codified as 10 U.S.C. 904 and 906, which explicitly authorized commission trial. In discussing the first, law of war, charge, the Court looked to Article 82. 317 U.S. at 41. And that first charge may have been pendant to charges 2 and 3. In fact, the government's formal specifications of the first charge tracked the statutory language of Articles 81 and 82. Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1282-83 (2002). *Madsen* also observed that in *Quirin*, the "conviction of saboteurs...was upheld on charges of violating the law of war *as defined by statute*." 343 U.S. at 355 n.22 (emphasis added).

[18] *See* EDGAR DUDLEY, MILITARY LAW 313 (3d ed. 1910) (commissions only in battle zones); *Eisentrager*, 339 U.S. at 780 (the "grave grounds for challenging military jurisdiction" in *Quirin* included that the trial was not "in a zone of active military operations"); *Madsen*, 343 U.S. at 348 (limiting holding to "territory occupied by Armed Forces"); *Caldwell*, 252 U.S. at 387 (the phrase "'except in time of war,'" doubtfully does anything "more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or...where civil authority was either totally suspended or obstructed, to deal with the crimes

example, forbade military trial of dependents outside of conquered territory, in spite of Article 15 and treaties authorizing them. The Court would not indulge "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient" because it would "destroy the benefit of a written Constitution and undermine the basis of our Government." 354 U.S. at 14. *Madsen* was "not controlling" because it "concerned trials in enemy territory which had been conquered and held by force of arms," *id.* at 35 n.63. The government argued that "present threats to peace" and "world tension" justified expanding the "battlefront" concept. *Id.* Yet the "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists," *id.*

Respondents have had many opportunities to provide facts showing that Hamdan resembles the *Quirin* saboteurs. At every turn, including in their Return, they have failed. Their recitation of "facts" to show jurisdiction, many for the first time upon appellate review, is too little, too late. To permit the President, on his say-so, to place anyone before this *ad hoc* commission is to countenance an unprecedented expansion of Executive authority.

G. The Commission Lacks Jurisdiction Because Petitioner Has Not Been Charged With An Offense Triable By Commission Under the Law of War

Although Congress has authorized the President to promulgate *procedures* for trials within the jurisdiction of

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specified--a doubt which...would demonstrate...the entire absence of jurisdiction in the military tribunals."); *Reid*, 354 U.S. at 40 ("Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," but "[w]e should not break faith with this nation's tradition of keeping military power subservient to civilian authority").

In *Quirin*, Attorney General Biddle stressed that the Eastern seaboard "was declared to be under the control of the Army." Pet. Br. App. 93a. The Court agreed. 317 U.S. at 22 n.1. *See also Yamashita*, 327 U.S. at 66 n.31; U.S. Br., *Yamashita*, at 42 ("Our army recaptured the Philippines by force of arms and has 'occupied' these Islands since within the meaning of the Regulations" governing the Trials of War Criminals).

commissions, 10 U.S.C. 836(a), it withheld the power to define the offenses subject to such trial. Rather, 10 U.S.C. 821 ordains that, at most, the jurisdiction of commissions would be defined by the law of war. This jurisdictional limitation is the defining feature of military tribunals and the most important protection against the threat to liberty and our constitutional separation of powers posed by the existence of military trials. *Milligan*, 71 U.S. at 127.

Quirin recognized that a court must examine if "it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged." 317 U.S. at 29. The Court "*must therefore first inquire* whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." *Id.* (emphasis added). The sole charge in this case, conspiracy, is not such an offense.

The charge fails to state a violation of the law of war for two reasons: 1) "conspiracy" is not an offense recognized by the laws of war; and 2) while acts of stateless terrorism are justifiably subject to severe punishment under civilian criminal law, they do not constitute war crimes falling within the jurisdiction of a military commission.

1. Conspiracy Is Not a Violation of the Laws of War

Neither the 1907 Hague Convention Respecting the Laws and Customs of War on Land, nor the Geneva Conventions of 1929 or 1949, make any mention of conspiracy as an offense against the law of war.[19] The failure of the 1949

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[19] In construing "longstanding law-of-war principles" in *Hamdi*, 542 U.S. at 521, the plurality relied primarily on provisions from the Hague and Geneva Conventions. *See also* Int'l Comm. of Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 471 (Pictet ed. 1960) ("ICRC Commentary") ("In actual fact, since the codification of 1949, there are no customary rules which are not included in either the Hague Conventions or in the new [1949 Geneva] Conventions. The points for which no provision is made are precisely those on which there is a lack of agreement.") In this context, the GPW's judicial enforceability is irrelevant. It codifies customary laws of war which bind the commission: "the customary rules become fully applicable in the case of a prisoner whose country of origin, or the Power on which he depends, is not a party to the international instruments governing the laws of war." *Id.*

Geneva Conventions to identify conspiracy is particularly significant, since those treaties require signatories to punish so-called "grave breaches" of the Conventions by criminal prosecutions. *See, e.g.*, GPW, art. 129. To fulfill this obligation, Congress passed the War Crimes Act of 1996 and the Expanded War Crimes Act of 1997, codified at 18 U.S.C. 2441. The Acts define a "war crime" as any "grave breach" of the Geneva Conventions, or violation of select provisions of the 1907 Hague Convention or the Landmine Protocol.

Thus, Congress no longer relies on the "common law of war" to define war crimes (as it did in World War II); it now has "crystalliz[ed]," *Quirin*, 317 U.S. at 30, and occupied the field with legislation identifying such crimes. Reflecting the universal disregard of conspiracy in international law, conspiracy is not on that large congressional list of offenses.

Likewise, the statutes and treaties establishing the major tribunals punishing war crimes in Rwanda and Yugoslavia, as well as the International Criminal Court, do not regard conspiracy as a war crime. The absence of conspiracy as a stand-alone crime is deliberate—conspiracy is seen as an abusive tool of prosecutors and rejected throughout the world. *See Amicus Br. of Specialists in Conspiracy*, at 6-18, 21-25. Customary international law evidences the same refusal. The Nuremburg judges, for example, ruled that there was no offense of conspiracy to commit war crimes or crimes against humanity. They rejected broad language in the London Charter suggesting such offenses.[20] And conspiracy

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[20] The court confined conspiracy to crimes against peace (aggressive war), and only against very high-level German officials who were directly involved in specific acts of aggression. "The International Military Tribunal ultimately interpreted the [conspiracy] concept very narrowly, and adopted a construction of the Charter under which conspiracies to commit 'war crimes' or 'crimes against humanity' were ruled entirely outside the jurisdiction of the Tribunal." Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials 70 (1949). As Assistant Attorney General Herbert Wechsler, head of the Criminal Division, stated, "it is an error to designate as conspiracy the crime itself, the more so since the common-law conception of the criminality of an unexecuted plan is not universally accepted in civilized law." *See The American Road to Nuremburg*, 84, 87 (Dec. 29, 1944 Mem.) (Smith ed. 1982).

doctrines have never been thought appropriate for war crimes charges against low-level offenders such as Hamdan.

In short, there is no stand-alone war crime of conspiracy that permits Petitioner's trial.[21] Accordingly, the commission lacks jurisdiction because Hamdan has not been charged with an offense that a commission may try.

2. *The Law of War Does Not Subject Offenses From the "War on Terror" to Trial by Military Commission*

As Petitioner's charge demonstrates, the President is attempting to use commissions as an alternative forum for the trial of criminal charges that historically have been tried in civilian courts. But if the Nation has lost confidence in the ability of its judicial system to adjudicate such claims, and has determined to shift the responsibility for the definition of offenses (and their trial and punishment) to the military, that decision must be made by Congress, not the President, and it must also be made with unmistakable clarity. No such decision is evident in the UCMJ or AUMF.

In using these commissions in the "war on terror," the President has expanded not only their traditionally limited jurisdiction, but also his own powers, both to "define and punish...Offenses against the Law of Nations" (a power vested in Congress in Art. I, § 8) and to adjudicate offenses (the province of the judiciary). The court of appeals ratified this maneuver, permitting the President to sweep aside not only the civilian, but also military, justice systems in circumstances untethered to armed conflict as traditionally understood. In *Hamdi*, for example, the Court could apply the laws of war to limit Executive detention because the

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[21] Indeed, Respondents' "definition" of conspiracy is woefully lacking. For example, it eliminates the most important element of conspiracy: agreement. Under Mil. Comm. Instr. No. 2, § 6(C)(6)(a)(1), a defendant need only "join[] an enterprise of persons who shar[e] a common criminal purpose." Furthermore, even under broad domestic standards, conspiracy is a specific intent crime. *See Clark v. La. State Penitentiary*, 694 F.2d 75 (5th Cir. 1982). Yet Hamdan's charge does not allege specific intent.

Domestic criminal law recognizes an offense of conspiracy because of its strong checks on prosecutorial and judicial abuse–indictment by a grand jury, jury trial, confrontation, access to exculpatory evidence, and so on. These procedural rights are preconditions before conspiracy is available.

conflict in Afghanistan is recognizable as a war.

The "war on terror"—which the Executive claims is a "separate conflict" under which Hamdan's commission is convened—is potentially unlimited in scope, duration, and all other criteria which traditionally separate a state of war from a state of peace. Thus, allowing any offense that could be associated with the "war on terror" to be tried by commission would permit thousands of civilian court prosecutions for terrorism to be transferred to commissions. Indeed, nothing prevents the President from extending his Military Order to American citizens. The careful jurisprudence and procedures of Article III courts, and those of courts-martial, would all be sacrificed for presidential flexibility. *See* Danny Hakim, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1 (describing Article III checks on prosecutorial abuse, particularly withholding exculpatory information, in terrorism cases). This case is the litmus test for such authority.

Quirin, decided in the context of a traditional war with conceded enemy belligerents, provides no precedent for such sweeping Executive authority. It even assumed "there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U.S. at 29.

One way in which this Court has confined commissions is by insisting on a Declared War or closure of civilian courts. In this case, Congress has not issued a Declaration against al Qaeda, nor has it in any other way expressed its intent to authorize and extend the laws of war to punishment in that conflict through commissions. "To apply the laws of armed conflict and thereby displace domestic and international criminal and human rights law below that threshold would be to do violence to human rights and civil liberties that protect us all." Official Statement (Rona), ICRC, *http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList488/3C2914F5 2152E565C1256E60005C84C0* (2004).

In every instance in which this Court has approved a

commission, Congress had explicitly declared war against a nation-state. In *Quirin*, for example, the Declaration prominently figured: "The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared," 317 U.S. at 26.[22] The power was directly traced to the declared war, *id.* at 26-28, in the same way that the same Court, six years later, relied on the Declaration to invoke the Alien Enemy Act of 1798, *Ludecke v. Watkins*, 335 U.S. 160 (1948). Similarly, *Yamashita* permitted commissions "so long as a state of war exists–*from* its *declaration* until peace is proclaimed." 327 U.S. at 11-12 (emphasis added); *see also Madsen*, 343 U.S. at 346 n.9 (authorization from Declare War power); *Eisentrager*, 339 U.S. at 775 ("whenever a 'declared war' exists."). A Declaration puts government officials and defendants on notice that ordinary civilian processes must give way.[23]

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[22] *E.g.*, 317 U.S. at 21 ("After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school"); *id.* at 26. Moreover, the meaning of Article 15 changed when the UCMJ was codified. Congress deleted the words "in time of war" from another provision, Article of War 78, to make clear that *that* provision, evidently in contrast to such others as Article 15, permitted a court-martial to impose death for trespass in circumstances "amounting to a state of belligerency, but where a formal state of war does not exist." H.R. 2498 Hrg. H. Cmte. Armed Serv., 81st Cong. 1229 (1949).

It is not only the power inherent to Declarations, but their specific language, that authorizes commissions. In World War II, Congress stated:

> [T]he state of war between the United States and the Government of Germany...is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States *and* the *resources of the Government to carry on war* against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress.

Jt. Res. Dec. 11, 1941, 55 Stat. 796, 796 (emphasis added); EDWIN CORWIN, TOTAL WAR AND THE CONSTITUTION 120 (1947). Other Declarations were similar. Jt. Res. Dec. 8, 1941, 55 Stat. 795 (Japan); Jt. Res. Dec. 7, 1917, 40 Stat. 429 (Austria-Hungary); Jt. Res. Apr. 6, 1917, 40 Stat. 1 (Germany).

[23] *See Youngstown*, 343 U.S. at 634 (Jackson, J., concurring); *id.* at 613 (Frankfurter, J., concurring); *N.Y. Times v. U.S.* 403 U.S. 713, 722 (1971) ("[T]he war power stems from a declaration of war") (Douglas, J., concurring); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 218 (2000);

The laws of war also govern other extreme circumstances where war is not declared but the conflict ends civilian law. *The Prize Cases*, 67 U.S. 635, 667 (1863) (using "common law" test of whether war exists by examining if "the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open"); *id.* at 682 (finding war had not begun and returning seized property). *Milligan* followed that test, 71 U.S. at 120, even though the Government told the Court that Lambdin Milligan was an unlawful combatant who "plotted to seize" arsenals and "conspired with and armed others." *Id.* at 17.[24]

At the very most, Congress has authorized commissions to enforce the laws of war. But Hamdan's commission has not been constituted to try crimes from the Afghan conflict. *Compare* Pet. App. 12a, 18a, *with Hamdi*, 542 U.S. at 521 (the

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Leslie Gelb & Anne-Marie Slaughter, *Declare War*, ATLANTIC MONTHLY, Nov. 2005 (founders insisted on a declaration of war because it maximizes "political accountability"); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992) (formal declaration of war needed).

Our courts have strictly policed military jurisdiction by insisting on declared war. In cases involving soldiers, who are always within military jurisdiction, courts are permissive. *E.g., United States v. Bancroft*, 3 U.S.C.M.A. 3 (1953). But when such jurisdiction is contested, as it is here, courts consistently require a Declaration. *United States v. Averette*, 19 U.S.C.M.A. 363, 365 (1970) (finding that Vietnam conflict was not a time of war because general usage does "not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction"); *Cole v. Laird*, 468 F.2d 829, 831 n.2 (5th Cir. 1972) (civilians are subject to court-martial in "a formally-declared, global war"); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972) ("the phrase 'in time of war'...refers to a state of war formally declared by Congress despite the fact that the conflict in Vietnam is a war in the popular sense of the word"); *Willenbring v. Neurauter*, 48 M.J. 152, 157 (C.A.A.F. 1998).

[24] Even for seizure of wagons and mules during the Mexican-American War, the Court required that "danger must be immediate and impending; or the necessity urgent." *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851). *See also Lee*, 358 U.S. at 233 ("The views of Blackstone on military jurisdiction became deeply imbedded in our thinking: 'The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.'"); *Duncan*, 327 U.S. at 326 (Murphy, J., concurring); *id.* at 335-37 (Stone, C.J., concurring).

"United States may detain, for the *duration of these* hostilities, individuals legitimately determined to be *Taliban* combatants 'who engaged in an armed conflict against the United States'") (plurality) (emphasis added). This case presents the question *Hamdi* left open, that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.*; *see also id.* at 551-52 (Souter, J., concurring in part).

Whether Hamdan's commission is authorized is not answered by the World War II cases either, since those operated in a traditional war between nation-states. That conflict was obviously governed by the laws of war, and the defendants fell within commission jurisdiction as enemy aliens.[25] Al Qaeda, however, is not a nation-state, and an accused's enemy status cannot be determined by citizenship. With a declaration of war, the laws of war apply in full; otherwise, they apply only where Congress has authorized their extension.[26] Even staunch defenders of Executive power concede that the Declare War Clause's "primary function was to trigger the international laws of war".[27]

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[25] *E.g.*, *Eisentrager*, 339 U.S. at 772 ("[i]n war, the subjects of each country were enemies to each other") (citation omitted). *Quirin* found that notwithstanding Haupt's U.S. citizenship, his joining of the German military made him an enemy under the "Hague Convention and the laws of war." 317 U.S. at 38. Haupt's relatives were tried by civilian courts because they had not joined the German military and were not "enemies."

[26] *See Bas v. Tingy*, 4 U.S. 37, 43 (1800) (Chase, J.) ("Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."); *id.* at 40 (Washington, J.) (similar); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801) ("congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.") (Marshall, C.J.); *Brown v. United States*, 12 U.S. 110, 129 (1814) (rejecting Presidential authority to confiscate enemy property without explicit statute during declared war); *Little v. Barreme*, 6 U.S. 170 (1804) (same reasoning applied to the taking of ships on the high seas).

[27] John Yoo, *The Continuation of Politics by Other Means: The Original*

The panel somehow reached the conclusion that Hamdan could be tried for a violation of the laws of war, even though it also found that the conflict with al Qaeda was not governed by the canonical statement of the laws of war—the GPW. But if the laws of war do not apply, there is nothing to charge. As Colin Powell warned, a finding that the Geneva Conventions do not apply "undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions." Sec. of State Mem., Jan. 2002, at *http://msnbc.msn.com/id/4999363*. In other words, if the GPW does not apply, then the laws of war do not apply; if the laws of war do not apply, then a commission has no jurisdiction. The panel took the untenable view that Petitioner lacks rights under treaties and statutes, but is subject to their penalties. *See Milligan*, 71 U.S. at 131 ("If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?").

If the UCMJ were stretched to give the President the sole discretion to decide when the laws of war applied and when they did not, it would become an unconstitutional delegation. *See Clinton*, 524 U.S. at 449-53 (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *Cal. Bankers v. Schultz*, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935). Such an interpretation would give the President the ability to set up tribunals at will, define

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Understanding of War Powers, 84 CAL. L. REV. 167, 242-43 (1996) (citations omitted). *See also id.* at 245 (Declaration notifies citizens and enemies); *id.* at 248 (distinguishing between partial and complete war); Eugene Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850 (1972) ("the term 'declare war' in the Constitution referred to the...sharp distinction between the law of war and the law of peace"); *id.* at 834-35, 856 (same); Eugene Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. L. REV. 1, 6 (1986) ("All international uses of force are not 'war' in the legal sense of the word, however bloody and extended the conflicts may be...A 'declaration of war' transforms the relationship between the belligerents"); *id.* at 51 (*Milligan* and *Covert* are among "the finest justifications of our claim to be a nation under law").

offenses as war crimes, and try cases before military judges that serve at his pleasure. Katyal & Tribe, *supra*, at 1290.

For this commission to be lawful, Respondents must show that the laws of war permit *this* offender and *this* charge in *this* conflict to be tried in a commission with *these* procedures. *Quirin* does not provide an adequate precedent, for the Court stated it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals" and "hold[s] only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." 317 U.S. at 45-46. Even with those limits, *Quirin* has been severely criticized. *Hamdi*, 542 U.S. at 572 n.4 (Scalia, J., dissenting) ("the *Quirin* Court propounded a mistaken understanding of *Milligan*"); *id.* at 592 (Thomas, J., dissenting); *Amicus Br.* of Quirin *Historians*. It is not a stable foundation for a dramatic expansion of Executive power that will become a permanent fixture in our law.

In the end, even if the "war on terror" is truly a war in which commissions can prosecute war criminals, the laws of war define their jurisdiction. Hamdan's commission falls well outside these parameters. The laws of war do not permit the charge, courts-martial and civilian courts are open, and the tribunal flouts court-martial rules and the laws of war themselves. Such a commission cannot be tolerated in a Republic such as ours, dedicated to the rule of law and the division of power, rather than its concentration in Executive hands.

II. PETITIONER'S COMMISSION VIOLATES THE THIRD GENEVA CONVENTION

Article 5 of the GPW requires a hearing to determine POW status "[s]hould any doubt arise." Until a "competent tribunal" decides otherwise, those captured "shall enjoy" its protections." *Id.* Hamdan was apprehended in a theater of military operations and asserts a right to GPW protection. JA 56-58. It is undisputed that no such Article 5 hearing has occurred. Thus, as the district court correctly concluded, Hamdan is entitled to presumptive POW status. One right

POWs hold is the Article 102 right to be tried by "the same courts, according to the same procedure as in the case of members of the armed forces of the Detaining Power." As such, even if Hamdan's commission is otherwise consistent with federal law, the Geneva Conventions bar his trial.

The district court's invalidation of the commission on this ground precisely tracks the views of our military. In 1951, the Manual for Courts Martial was revised because GPW ratification "will alter to a material extent the procedures heretofore applied by military commissions." Pet. Br. App. 34a. Under GPW Articles 85 and 102, "unless we are willing to try our own personnel who commit war crimes by military commission under a more summary procedure than that provided for courts-martial and under civil law rules of evidence—we will have to try enemy prisoners of war accused of war crimes under the same procedure as that prescribed for courts-martial." *Id.* Respondents have no authority to depart from this longstanding rule, which was designed to outlaw a spoils system of victor's justice.

A. The GPW Is Enforceable Without Its Self-Execution

The court of appeals did not reject Hamdan's GPW claim on the merits, but rather because the "Convention does not confer upon Hamdan a right to enforce its provisions in court." Pet. App. 10a. That conclusion is in error.

As an initial matter, the court of appeals was wrong in concluding that the rights to which petitioner lays claim are embodied solely in the GPW. To the contrary, the United States has implemented its obligations under the GPW by statute[28] and regulation,[29] both of which are subject to

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[28] *See* National Defense Authorization Act, § 1091(b)(4), Pub. L. No. 108-375, 118 Stat. 1811, 2069 (2004) ("It is the policy of the United States to ...ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal."); *id.* § 1092(a) (directing Secretary of Defense to implement procedures to ensure that detainees are treated "in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b)"); *id.* § 1092(b)(3) (requiring "[p]roviding all

enforcement through a mandamus or habeas corpus petition. *Miguel v. McCarl*, 291 U.S. 442, 451 (1934) ("[W]here the proper construction of a statute is clear, the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus"); 28 U.S.C. 2241(c).[30]

Second, the GPW is part of the law of war and limits the jurisdiction of commissions, see 10 U.S.C. 821, a limitation

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detainees with information, in their own language, of the applicable protections afforded under the Geneva Conventions").

[29] *See* AR 190-8 § 1-5(a)(2) ("All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent legal authority."); *id.* § 1-6 ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status...who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists"); *id.* § 3-7 ("Judicial proceedings against [POWs] will be by courts-martial or by civil courts. When [POWs] are tried by courts-martial, pretrial, trial, and post-trial procedures will be according to the UCMJ and the U.S. Manual for Courts-Martial. [POWs] will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried.").

These regulations have long been included in military manuals, further evidencing GPW implementation. *See, e.g.*, Army Field Manual (FM) 27-10, *The Law of Land Warfare*, ch. 3 §I ¶71 (1956) ("[Article 5] applies to any person not appearing to be entitled to prisoner-of-war status...who asserts that he is entitled to treatment as a prisoner of war"); Judge Advocate General's School, *Operational Law Handbook* 22 (2003) ("regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention").

[30] AR 190-8, as "authorized War Department regulations[,] have the force of law." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942). *See also Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) ("[T]he Secretary...was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily"); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (same); *Paul v. United States*, 371 U.S. 245, 255 (1963) (same); *Nixon v. Sec'y of the Navy*, 422 F.2d 934, 937 (2d Cir. 1970) ("[t]he Navy is bound by its own validly promulgated regulations, and the district courts [on mandamus] are free to entertain suits by servicemen requesting compliance with such rules"); *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) ("a validly promulgated regulation binds the government [even when] the government action is essentially discretionary in nature.").

this Court has repeatedly enforced.[31] Thus, for example, in *Quirin*, this Court carefully considered the petitioners' status to discern whether they were, in fact, unlawful belligerents triable by commission. 317 U.S. at 36-37. The Government has acknowledged that the laws of war now include the GPW. (JA 207-8). As explained above, under GPW Article 102, Hamdan is not an "offender" triable by commission because a member of the U.S. armed forces is not subject to commission trial. Likewise, as explained above, "conspiracy" is not an "offense" recognized by the laws of war and thus is not triable in a commission.

Respondents' reliance on § 821 runs against the long-standing canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also MacLeod v. United States*, 229 U.S. 416, 427 (1913) (interpreting a presidential order during Spanish-American War so that it is "consistent with the principles of international law"); *Cross v. Harrison*, 57 U.S. 164, 190 (1853) (adopting "the law of arms"); *Prize Cases*, 67 U.S. at 665 (addressing whether the President had "a right to institute a blockade...on the principles of international law"); *Brown*, 12 U.S. at 125-28; *id.* at 153 (Story, J., dissenting) ("when the legislative authority...has declared war in its most unlimited manner, the executive... cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or

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[31] *Quirin* interpreted the predecessor of § 821 to "incorporat[e] the law of war." 317 U.S. at 38. So, too, *Yamashita* found that the predecessor statute adopted rules "further defined and supplemented by the Hague Convention," 327 U.S. at 8. *See also* H. Armed Servs. Comm. Hrng., 81st Cong., at 959 (1949) ("'Law of war' is set out in various treaties like the Geneva convention and supplements to that.") (Col. Dinsmore).

10 U.S.C. 821 was enacted under Congress' Article I "define and punish" power. To read that Clause to permit tribunals whose procedures violate international law is contrary to its purpose. *See* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 36 (1952). "[T]o pretend to define the law of nations which depend[] on the authority of all the Civilized Nations of the World[] would have a look of arrogance that would make us ridiculous." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Farrand ed. 1911) (James Wilson).

authorize proceedings which the civilized world repudiates and disclaims."); *Amicus Br. of Urban Morgan Institute* at 3-14. The *Hamdi* plurality followed this tradition by interpreting the AUMF in light of "longstanding law-of-war principles," including the GPW. 542 U.S. at 519-21.[32]

Third, Congress has specifically authorized courts to determine whether Petitioner's detention is "in violation of the Constitution or laws *or treaties* of the United States." 28 U.S.C. 2241(c)(3) (emphasis added). In accordance with that language, this Court has repeatedly entertained habeas corpus actions to enforce treaty-based rights.[33]

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[32] Moreover, under the last-in-time rule, when a treaty is subsequent to congressional action, the treaty controls. *Reid*, 354 U.S. at 18 n.34 (plurality). *Cook v. United States*, 288 U.S. 102, 119 (1933), found that a 1924 treaty trumped a 1922 statute, even though Congress reenacted the statute in 1930. Statutes enacted after a treaty do not trump the treaty without a clear statement. *Id.* at 120. Therefore, the Geneva Conventions, ratified in 1955, control this case and overcome any contrary implication from § 821.

[33] *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17 (1887) ("we see no reason why [petitioner] may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States"); *United States v. Rauscher*, 119 U.S. 407 (1886); *Chew Heong v. United States*, 112 U.S. 536, 560 (1884) (granting relief to habeas petitioner to re-enter the United States as established by treaty); *Medellin v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) ("This Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties...do not share any special magic words. Their rights-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement.") (citing cases).

For example, *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003), enforced a treaty based on implementing regulations. It did so despite the statute's language that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims under the Convention or this section." *Id.* at 140 (quoting 8 U.S.C. 1252). Such language "does not speak with sufficient clarity to exclude [treaty] claims from §2241 jurisdiction"; to conclude otherwise would raise constitutional concerns under *St. Cyr.* "'[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.'" *Id.* at 143 (citation omitted). Other courts have reached the same conclusion. *St. Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003); *Singh v. Ashcroft*, 351 F.3d 435, 441 (9th Cir. 2003).

Moreover, one theory holds that "a treaty that is ratified but not self-executing need not be implemented in order for a party to have a habeas

Likewise, treaty rights have long been enforced through petitions for mandamus. For example, *Jordan v. Tashiro*, 278 U.S. 123, 128-30 (1928), permitted such a petition to protect Japanese nationals' rights under a 1911 treaty. The Court articulated a fundamental canon of treaty interpretation: "where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred." *Id.* at 127. Notably, the Court went on to state: "The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise." *Id.* at 130. Of course, the "usual methods and instrumentalities" for enforcing rights include lawsuits. So long as the GPW is in effect in domestic law (and there is no dispute that it is), and so long as the GPW protects individual rights (and the Government admits that it does), then it is judicially enforceable, and Hamdan can rely on the habeas statute or common-law mandamus to supply the form of action. *See Rasul*, 542 U.S. at 483; *Factor*, 290 U.S. at 286; *Chew Heong*, 112 U.S. at 560; *Jordan*, 278 U.S. at 128-30.

The panel's decision in this case "amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation." Pet. App. 34a. The Court should reject that claim, which strips the judiciary of its time-honored role as enforcer of treaty-based rights.

B. The GPW Provisions Are Directly Enforceable

Hamdan's rights are separately enforceable under the Supremacy Clause because the GPW is self-executing. A treaty is self-executing when "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Treaties that "by their terms confer rights upon individual citizens," *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976), are generally self-

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cause of action under that treaty." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n.22 (3d Cir. 2003).

executing, unless a contrary intention is manifest. RESTATEMENT (THIRD) OF FOREIGN REL. LAW § 111 Rptr.'s n.5 (1987) ("RESTATEMENT").

"To ascertain whether [a provision] confers a right on individuals, we first look to the treaty's text as we would with a statute's." *Medellin v. Dretke*, 125 S. Ct. 2088, 2103 (2005) (O'Connor, J., dissenting); *id.* (stating that under *Foster v. Neilson*, 27 U.S. 253 (1829), "[b]ecause the [Vienna] Convention is self-executing,...its guarantees are susceptible to judicial enforcement just as the provisions of a statute would be."). The GPW's text plainly confers individual rights; it does not merely regulate relations among states. Nothing in the relevant GPW provisions (particularly Arts. 3, 5, and 102) calls for legislation. Congress knew "that very little in the way of new legislative enactments will be required to give effect to the provisions." Ratifying Report, *supra*, at 30. The Committee identified only four areas where additional legislation would be required, none at issue here. *Id.* at 30-31. Of course, "[s]ome provisions of an international agreement may be self-executing and others non-self-executing." RESTATEMENT, § 111 cmt. h; Pet. App. 36a.

The Government no longer contends that the GPW is not self-executing. Instead, it argues that the GPW does not contemplate judicial enforcement. The Court of Appeals accepted this argument by selectively quoting an 1884 case. Pet. App. 7a (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). But the panel ignored language in the same opinion explaining when treaty provisions *are* judicially enforceable:

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.... A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision

for the case before it as it would to a statute.

112 U.S. at 598-99. Indeed, this Court has repeatedly enforced treaty rights for two centuries without stopping to inquire whether a "private right of action" was created.[34]

In this case, the panel admitted that the GPW protects individual rights. Pet. App. 10a. However, it concluded that *dicta* in a footnote of *Eisentrager*, 339 U.S. at 789 n.14, about the 1929 Geneva Convention bound its decision. The panel's use of that footnote was gravely flawed. First, *Eisentrager* concerned jurisdiction, and that holding has been superseded by *Rasul*. The footnote merely reflected the Court's consideration of whether, apart from the habeas statute, the 1929 treaty provided a basis for jurisdiction.

Second, the GPW drafters thought the 1929 treaty failed to adequately protect POWs and wrote a completely different instrument. See *supra* p.2. A major innovation of the GPW is Article 5, which creates a presumption in favor of protection and the right to a status determination—an Article that was completely absent from the 1929 treaty:

> This amendment was based on the view that decisions which might have the gravest consequences should not be made by a single person.... *The matter should be taken to a court...*

ICRC Commentary, *supra*, at 77 (emphasis added). Article 5 thus illustrates that the GPW did not rely entirely on diplomatic enforcement. *See also id.* at 90-91 ("It was not until the Conventions of 1949...that the existence of 'rights'

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[34] *See, Amicus Br. of Louis Henkin et al. (Henkin Br.); Kolovrat v. Oregon*, 366 U.S. 187 (1961) (treaty-based rights of non-resident aliens enforced to prevent state action in taking of property); *Jordan, supra; Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (affirming injunctive relief against ordinance that violated a treaty; "[the treaty] operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (land grants confirmed by treaty are judicially enforceable); *Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809) ("Whenever a right grows out of, or is protected by, a treaty...whoever may have this right, it is to be protected"); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) ("[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress.").

conferred on prisoners of war was affirmed."); *id.* at 23 ("the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."); Geoffrey Best, *War and Law Since 1945*, at 80-114 (1994).

Eisentrager itself reflects the weakness of the 1929 Convention. It held that no rights were at issue in the case because the 1929 treaty did *not* "appl[y] to a trial for war crimes." 339 U.S. at 790. The GPW specifically *reversed* that interpretation, which originated in *Yamashita*, 327 U.S. at 22. *See* GPW art. 85; ICRC Commentary, *supra*, at 413.

Finally, the fact that the GPW prescribes a role for neutrals or "Protecting Powers" in disputes does not remotely support the inference that diplomacy was intended as the *only* method of enforcement. Rather, its very first Article requires signatories to do all within their power "to respect and to ensure respect for the present Convention in all circumstances." Art. 1. *See* ICRC Commentary, at 17-18 ("it is not merely an engagement concluded on a basis of reciprocity" but "a series of unilateral engagements"; "it is for the Government to supervise the execution of the orders it gives" and "must of necessity prepare...the legal, material or other means of ensuring the faithful enforcement").

In this country, the mechanism for "ensur[ing] respect" for treaty rights includes the independent judiciary. Indeed, the GPW drafters understood that enforcement would be promoted by a combination of factors, including

> pressure of public opinion, pressure by Powers party to the Convention but not involved in the conflict, the fear of the members of the Government in power of being subsequently disavowed or even punished, and *court decisions*....The individual is considered in his own right. The State is not the only subject of law....

Id. at 86 (emphasis added).

Finally, the presence of diplomatic enforcement provisions has not precluded judicial enforcement. For example, in *Chew Heong*, the Court granted habeas corpus to protect a Chinese national's treaty rights, even though the treaty provided for diplomatic remedies and not for judicial enforcement. 112 U.S. at 542, 549-56. *See also Shanks v. Dupont*, 28 U.S. 242 (1830); *Louis Henkin Br.*, *supra*, at 24-28.

C. The Geneva Conventions Protect Petitioner

The court of appeals concluded that Hamdan was chargeable under the law of war but not protected by it. The propositions are backwards. The laws of war do not apply in the allegedly separate "war on terror" in which Hamdan's commission has been convened, but they do protect those *captured* in the conflict in *Afghanistan*, including Hamdan. GPW Article 2 provides, in pertinent part:

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties....The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party.

Afghanistan and the United States are High Parties. Yet Respondents claim that Hamdan is not protected because the "war against terror" is a separate conflict. This position ignores the undisputed facts of Hamdan's capture, is inconsistent with Article 2, and departs from American practice.

First, even if absolute deference is shown to the Executive with respect to its distinction between the Taliban and al Qaeda, and even if al Qaeda fighters are not protected by the GPW, Hamdan *denies* he is a member of al Qaeda. The Government cannot rely on an unproven allegation to deny Hamdan GPW protections pending an Article 5 hearing. This is the clear import not only of the Article, but also of federal statutes and regulations, *supra* pp. 37-41.[35]

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[35] "Doubt" triggering the Article 5 presumption of POW status arises from Hamdan's denial of al Qaeda membership, the circumstances surrounding his capture (*i.e.*, seizure by a local militia and delivery to U.S. forces in exchange for a bounty), and the sufficient but not necessary assertion of protected status under the GPW. *E.g.*, J.A. 49-54, 57; Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5000 for each Taliban prisoner and 20,000 for a Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess"). In addition, Hamdan has strong claims to protection under GPW Art. 4A(4) and 4A(1). *See Amicus Br. of Ryan Goodman, Derek Jinks & Anne-Marie Slaughter* at 6-16 (*Goodman/Jinks/Slaughter Br.*).

Second, it is undisputed that Hamdan was captured in a conflict that meets the conditions of Article 2. The alleged "separate conflicts" against al Qaeda and the Taliban were fought on the same territory, at the same time, with the same forces, under the same congressional resolution.[36] As the State Department Legal Advisor explained:

> [The suggestion that there is] a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protection as a matter of law.

William Taft IV Memorandum, Legal Advisor, State Dep't ¶3 (2/2/02), at *http://www.fas.org/sgp/othergov/taft.pdf.*

This is consistent with the practice of the U.S. military in every major conflict since World War II. For example, in Vietnam, with its high incidence of irregular warfare, the military accorded POW status to both regular North Vietnamese Army and Viet Cong fighters. Even guerillas were given Article 5 hearings.[37] There was no gap.

A negative Article 5 finding would merely protect Hamdan under similar rights in the Fourth Convention. "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention...*There is no* intermediate status; nobody in enemy hands can be outside the law." ICRC Commentary, *IV Geneva Convention Relative to the Protection of Civilian Persons* 50-51 (1960) (emphasis added).

[36] Respondent Rumsfeld stated that "the Taliban... were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them," at *http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html.*

[37] 60 DOCUMENTS ON PRISONERS OF WAR 722-31, 748-51 (Levie ed. 1979). Irregular fighters were given POW status unless caught in an act of "terrorism, sabotage or spying," and if denied POW status, they were given protections of the Fourth Geneva Convention. Elsea, Cong. Rsch. Serv., *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002).

Accordingly, under GPW Article 102, those committing offenses in the Afghan conflict may be tried by courts-martial for war crimes, not by commissions.

Third, the panel's deference to the President's determination that Hamdan was captured in a separate conflict is unwarranted. *See Amicus Br. of Retired Generals and Admirals.* The panel relied on *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986), but that case *rejected* a contention that the political question doctrine barred judicial resolution of an issue affecting foreign policy: "[T]he courts have the authority to construe treaties and executive agreements." *Id.* at 230. While the Executive's interpretation is "of weight," it is settled that "the construction of a treaty by the political department of the government" is "not conclusive upon courts called upon to construe it." *Factor*, 290 U.S. at 295. This Court has declined to adopt Executive interpretations many times. *See, e.g., Perkins v. Elg*, 307 U.S. 325, 335-42 (1939); *Johnson v. Browne*, 205 U.S. 309, 319-21 (1907); *De Lima v. Bidwell*, 182 U.S. 1, 181, 194 (1901).

In short, Respondents' contention that no individual assessment of Hamdan's status is required, and that he can be denied POW status by presidential fiat, is irreconcilable with text of Article 5, defeats its purpose, and departs from past American practice. This undermines "respect for the present Convention" (GPW art. 1) and compromises our ability to insist on GPW observance when American personnel fall into enemy hands. The Court should reject that position, and consistent with longstanding tradition, adopt the treaty interpretation that faithfully enforces the protections the United States has promised to others and expects for its own forces. *Factor*, 290 U.S. at 293.[38]

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[38] The panel also reached the extraordinary conclusion that Hamdan could raise his POW status claim in his commission. Pet. App. 16a. This acknowledges that "doubt" concerning Hamdan's status exists, and such doubt precludes a commission trial in the first place. It would condone an unprecedented procedural laxity, including a 4-year delay, in implementing a solemn treaty obligation. The commission also does not meet AR 190-8, and his status determination cannot take place in a tribunal trying him for war crimes. Finally, even if the commission could serve as an Article 5 tribunal, it has not been convened to do so. Instead,

D. Common Article 3 Protects Hamdan

The commission is also invalid because it violates GPW Article 3, which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" in "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Pet. App. 12a. This provision sets forth the "most fundamental requirements of the law of war." *Kadic v Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995). Additional Protocol I, *supra*, which binds the United States as customary international law, separately requires a "regularly constituted court."

Even if Hamdan does not qualify as a POW under GPW Article 4, he is nonetheless protected by these provisions. The commission clearly does not comply with them because it is not a "regularly constituted court." As the ICRC's definitive recent work explains, a "court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country." INT'L CTE. RED CROSS, 1 CUSTOMARY INT'L HUMANITARIAN LAW 355 (2005). The "court must be able to perform its functions independently of any other branch of the government, especially the executive." *Id.* at 356.

Instead, the commission is an *ad hoc* tribunal fatally compromised by command influence, lack of independence and impartiality, and lack of competence to adjudicate the complex issues of domestic and international law. Pet. 28; Pet. App. 96a-102a. The rules for trial change arbitrarily—and even changed after the Petition for Certiorari was filed. It is not regularly constituted; its defects cannot be cured without a complete structural overhaul and fixed rules. *See, Amicus Br. of Madeleine Albright et al.* at 4-19.

Commission procedures also fail to provide adequate "judicial guarantees" in many ways, including admitting

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the Executive contends that it has no obligation to provide a status determination and claims no court has the authority to say otherwise.

evidence extracted under duress and denying the fundamental rights of confrontation and presence. These flaws are not theoretical; they have already had practical consequence, as Hamdan's exclusion from *voir dire* reveals.

The divided panel nonetheless held that Article 3 does not apply because the conflict against al Qaeda is "international," and Article 3 only applies to internal conflicts. Even were that true, Article 3 extends to all conflicts as a matter of customary international law. And as Judge Williams recognized: "the logical reading of 'international character' is one that matches the basic derivation of the word 'international,' i.e., *between nations*." Pet. App. 17a. *Kadic* and other cases establish that Article 3 binds *all* conflicts, and *all* parties, as a minimum standard of conduct. *E.g., Prosecutor v. Delalic*, Judgement, IT-96-21-A ¶143 (ICTY App. 2001) (Common Article 3 principles "are so fundamental that they are regarded as governing both internal and international conflicts"); *Nicaragua v. United States*, 1986 I.C.J. 14, 114 (Article 3 is "a minimum yardstick" for international conflict); *Goodman/Jinks/Slaughter Br.* at 17-27; *Amicus Br. of City Bar of New York.*

As an alternative holding, the panel found abstention appropriate on Common Article 3. But abstention on this claim is improper for the same reasons the panel gave in rejecting abstention earlier in its opinion. The panel approved of the *Quirin* defendants' pre-conviction challenge to the tribunal's lawfulness and jurisdiction. The animating concerns of *Councilman* abstention "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." Pet. App. 3a.

For reasons developed already in this Court, this is not a typical abstention case because the lawfulness of the tribunal is at stake. Cert. Reply Br., at 1-6; C.A. Br. 25-30. If the commission is not a "regularly constituted court" under Common Article 3, it is not authorized under Section 821. The commission is not a regular trial applying regular procedures, like courts martial or Article III trials. Rather, it lacks speedy trial rights and Hamdan can languish for many years (indeed, forever) before a final decision is rendered. C.A. Br. 10-13. The commission lacks competence, expertise,

and impartiality. *Id.* at 13-20. And because, unlike courts-martial, the President makes the final decision in Hamdan's case, abstention is futile; the President has already stated his views on the questions presented. *Id.*

Unlike other settings, the abstention question here is integrally bound up with the merits. *See Amicus Br. of Arthur Miller.* On every other issue in this case, Respondents claim court-martial rules are irrelevant; yet here they seek to reap its favorable benefits such as *Councilman* abstention.

As the panel recognized, there are rights at the periphery of Common Article 3 that may necessitate trial before federal review. Pet. App. 13a. But the simple matters of whether the commission is a "regularly constituted court," and can deny fundamental rights (including the right to be present, trial by an impartial body, and trial without risk of testimony obtained by torture) are surely not among them. A commission that does not comply with such rules violates the laws of war and is improperly constituted. Waiting for a trial accomplishes nothing, except to put Petitioner in a state of limbo as to trial strategy and his fate that may persist for years. *See Amicus Br. of Prof. Richard Rosen et al.* at 6-24. Again, in contrast to all other American criminal processes, there is no incentive whatsoever to reach final decision under this scheme. In this rare setting, abstention does more harm to the rule of law than does reaching the merits.

* * *

This Court has long understood that, in all of American law, there is "no graver question" than the fundamental one presented here. *Milligan*, 71 U.S. (4 Wall.) at 118. Given the myriad ways in which Hamdan's trial would run afoul of constitutional, statutory, and treaty-based rights, Petitioner's entitlement to the modest relief sought is manifest.

CONCLUSION

The Court of Appeals' judgment should be reversed and Hamdan's Petition should be granted.

Respectfully submitted,

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APPENDIX A

U.S. Const. Art. I, Section 8 states in part:

The Congress shall have power...to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

U.S. Const. Art. III, Section 2, cl. 1 states:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Art. III, Section 2, cl. 2 states:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. Art. VI states in part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Amend. 14 states in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) states in part

(2)(a) IN GENERAL.--That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

10 U.S.C. Section 802 states in part:

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it...

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial....

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of

international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

10 U.S.C. Section 810 states:

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

10 U.S.C. Section 818 states:

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the

kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

10 U.S.C. Section 821 states:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. Section 836 states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

10 U.S.C. Section 839 states:

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of--

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.

10 U.S.C. Section 867 states:

(a) The Court of Appeals for the Armed Forces shall review the record in--

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of--

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

10 U.S.C. Section 867a states:

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

10 U.S.C. Section 904 states:

Any person who--

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or

corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

10 U.S.C. Section 906 states:

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

10 U.S.C. Section 3037 states:

(a) The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps who are recommended by the Secretary of the Army. An officer appointed as the Judge Advocate General or Assistant Judge Advocate General normally holds office for four years. However, the President may terminate or extend the appointment at any time. If an officer who is so appointed holds a lower regular grade, he shall be appointed in the regular grade of major general.

(b) The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State or Territory, and who have had at least eight years of experience in legal duties as commissioned officers.

(c) The Judge Advocate General, in addition to other duties prescribed by law--

(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;

(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and

(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

18 U.S.C. Section 242 states in part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien...than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both...

18 U.S.C. Section 2441 states:

(a) Offense.--Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.--The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.--As used in this section the term 'war crime' means any conduct--

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any

protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

28 U.S.C. Section 1254 states:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. Section 1361 states:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. Section 1651 states:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. Section 2241 states:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or

exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

42 U.S.C. Section 1981 states in part:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

P.L. 108-375, Section 1091 states:

(a) SENSE OF CONGRESS.--It is the sense of Congress that-- (1) the abuses inflicted upon detainees at the Abu Ghraib prison in Baghdad, Iraq, are inconsistent with the

professionalism, dedication, standards, and training required of individuals who serve in the United States Armed Forces;

(2) the vast majority of members of the Armed Forces have upheld the highest possible standards of professionalism and morality in the face of illegal tactics and terrorist attacks and attempts on their lives;

(3) the abuse of persons in United States custody in Iraq is appropriately condemned and deplored by the American people;

(4) the Armed Forces are moving swiftly and decisively to identify, try, and, if found guilty, punish persons who perpetrated such abuse;

(5) the Department of Defense and appropriate military authorities must continue to undertake corrective action, as appropriate, to address chain-of-command deficiencies and the systemic deficiencies identified in the incidents in question;

(6) the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States;

(7) the alleged crimes of a handful of individuals should not detract from the commendable sacrifices of over 300,000 members of the Armed Forces who have served, or who are serving, in Operation Iraqi Freedom; and

(8) no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of United States.

(b) POLICY.--It is the policy of the United States to—

(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States;

(2) investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States;

(3) ensure that all personnel of the United States Government understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment of detainees in the custody of the United States;

(4) ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal; and

(5) expeditiously process and, if appropriate, prosecute detainees in the custody of the United States, including those in the custody of the United States Armed Forces at Guantanamo Bay, Cuba.

(c) DETAINEES.--For purposes of this section, the term "detainee" means a person in the custody or under the physical control of the United States as a result of armed conflict.

P.L. 108-375, Section 1092 states:

(a) POLICIES REQUIRED.--The Secretary of Defense shall ensure that policies are prescribed not later than 150 days after the date of the enactment of this Act regarding procedures for Department of Defense personnel and contractor personnel of the Department of Defense intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b).

(b) MATTERS TO BE INCLUDED.--In order to achieve the objective stated in subsection (a), the policies under that subsection shall specify, at a minimum, procedures for the following:

(1) Ensuring that each commander of a Department of Defense detention facility or interrogation facility—

(A) provides all assigned personnel with training, and documented acknowledgment of receiving training, regarding the law of war, including the Geneva Conventions; and

(B) establishes standard operating procedures for the treatment of detainees.

(2) Ensuring that each Department of Defense contract in which contract personnel in the course of their duties interact with individuals detained by the Department of Defense on behalf of the United States Government include a requirement that such contract personnel have received training, and documented acknowledgment of receiving training, regarding the international obligations and laws of the United States applicable to the detention of personnel.

(3) Providing all detainees with information, in their own language, of the applicable protections afforded under the Geneva Conventions.

(4) Conducting periodic unannounced and announced inspections of detention facilities in order to provide continued oversight of interrogation and detention operations.

(5) Ensuring that, to the maximum extent practicable, detainees and detention facility personnel of a different gender are not alone together.

(c) SECRETARY OF DEFENSE CERTIFICATION.--The Secretary of Defense shall certify that all Federal employees and civilian contractors engaged in the handling or interrogation of individuals detained by the Department of Defense on behalf of the United States Government have fulfilled an annual training requirement on the law of war, the

Geneva Conventions, and the obligations of the United States under international law.

Third Geneva Convention, relative to the Treatment of Prisoners of War (1949)

Article 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples...

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and

which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 85

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall

retain, even if convicted, the benefits of the present Convention.

Article 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Fourth Geneva Convention, Relative to the Protection of Civilian Persons in Time of War

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12,

1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

Article 65

The penal provisions enacted by the Occupying Power shall not come into force before they have been published

and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

Article 66

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

Article 67

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence. They shall take into consideration the fact that the accused is not a national of the Occupying Power.

Article 68

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

Article 70

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

Article 71

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more; it shall be

enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

(a) Description of the accused;

(b) Place of residence or detention;

(c) Specification of the charge or charges (with mention of the penal provisions under which it is brought);

(d) Designation of the court which will hear the case;

(e) Place and date of the first hearing.

Article 72

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Article 146

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or

to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

APPENDIX B

PREFACE

This pamphlet contains a short history of the preparation of the Manual for Courts-Martial, United States, 1951, together with brief discussions of the legal and legislative considerations involved in the drafting of the book. With minor exceptions, the discussions of the various subjects were written by the officers who prepared the initial drafts of the comparable portions of the manual.

/s/
WILLIAM P. CONNALLY, JR.
Colonel, JAGC

19 April 1951

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Colonel Charles L. Decker

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HISTORY, PREPARATION AND PROCESSING, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951

Colonel Charles L. Decker

The history of the drafting and processing of the Manual for Courts-Martial, 1951, is one of careful preparation followed by many careful reviews of each draft.

On 21 February 1950, the Judge Advocates General of the Army, Navy, and Air Force met with the General Counsel, Office of the Secretary of Defense, and decided to proceed on a joint basis in the preparation of a Manual for Courts-Martial to implement the then proposed Uniform Code of Military Justice. Colonel William P. Connally, Jr., Assistant Judge Advocate General for Military Justice, Department of the Army, was instructed to direct the preparation of such a manual.

Colonel Connally assigned to the Special Projects Division, which was under his supervision, those officers of his office who had prepared the Manual for Courts-Martial, U. S. Army, 1949. Assigned were Colonel Charles L. Decker, Chief of Division, Lt. Colonel Waldemar A. Solf, Executive Officer, Major Gilbert G. Ackroyd, Major Kenneth J. Hodson, and Major William H. Conley. A Navy legal officer, Commander William A. Collier, and an Air Force judge advocate, Lt. Colonel Jean F. Rydstrom, were placed on duty with the Division, and each not only acted as a liaison officer but performed a full share in the actual drafting of the book. Subsequently, Major Roger Currier was assigned to the Division to augment the Army complement.

The actual initial drafting was divided into 30 separate projects, which were apportioned among the officers of the division so that each was drafted by an officer considered expert in the particular field. The plan required completion of the initial draft of the entire book, less index, by 15 September 1950. The draft was completed according to plan.

Each of the 30 projects consisted of four parts: the proposed draft for the Manual for Courts-Martial, United States, 1951; a file of those parts of the Manual for Courts-Martial, U. S. Army, 1949, Naval Courts and Boards, 1937, and. of the Manual for Courts-Martial, U. S. Coast Guard, 1949, which treated the subject of the project; a table of legal authorities and relevant legislative history; and. a brief supporting memorandum explaining the reasoning which underlay the draft itself.

As the draft of each project was approved within the division, it was forwarded to Colonel Connally. Copies of the draft as approved by him were sent for review to a representative of each Judge Advocate General. These representatives were Colonel John E. Curry, USMC, Brigadier General Herbert M. Kidner, USAF, and Colonel Connally. After the drafts were reviewed by the representatives, they or their designated representatives reviewed each project in conference. The draft as finally approved by them was reproduced and forwarded for review to the three Judge Advocates General and the General Counsel, Office of the Secretary of Defense. The Judge Advocates General and the General Counsel held numerous personal conferences in which differing views were thoroughly scrutinized and resolved. The draft of the text and appendices of the manual, as finally approved by the Judge Advocates General, was reproduced and cleared through the various agencies in each department having an interest therein. Final departmental clearance was, of course, indicated by the Secretaries themselves.

After clearance within the Department of Defense, Colonel Decker was designated as Department of Defense representative to effect clearances with the other interested governmental agencies. In addition to the normal study made by the Bureau of the Budget, that office also retained special counsel to make an independent study of the draft. Thereafter the draft was reviewed and cleared by the office of the

Attorney General. This review consisted of a study by three experts in criminal law and procedure, as well as further review by other attorneys in the Department of Justice. Thereafter the work was reviewed by the Director of the Archives and transmitted to the Executive Office of the President, where, after due study, the Manual for Courts-Martial, United States, 1951, was duly promulgated as Executive Order 10214 on 8 February 1951.

Conference No. 1

MILITARY JURISDICTION; JURISDICTION OF COURTS-MARTIAL; HABEAS CORPUS

Conducted by
LT. COL. WALDEMAR A. SOLF

References: Chapter 1, Paragraphs 1, 2
Chapter 2, Paragraphs 3, 4g
Chapter 3, Paragraph 5
Chapter 4, Paragraphs 8-16
Chapter 29, Paragraphs 214-218

CHAPTER I - MILITARY JURISDICTION

This chapter will look familar to Army and Air Force personnel--but it may look a little abbreviated to the Navy and the Coast Guard. It differs from the first chapter of NC & B in that its scope is limited to sources of military jurisdiction; not the broader subject of sources of military law. It was felt that the discussion in Chapter I of Naval Courts and Boards relative to the sources of military law was extremely useful and much of it was incorporated in other parts of the Manual. For example, Section 4, "Knowledge of Naval Law required," may be found in paragraph 154a(4). A discussion of the legal effect of custom is to be found in paragraph 213a which discusses the general Article (134).

Sources.--This paragraph states that the sources of military law include the Constitution and International law. One fairly obvious point is stressed; namely, that the law of war is included in international law. See Ex parte Quirin 317, U. S. 1. International law, apart from the law of war, is also a source of military jurisdiction. Among the classes of cases in which military jurisdiction is affected by international law other than the law of war are the cases involving offenses committed in a friendly foreign country where an armed force is by consent quartered or in passage. This will be discussed in greater detail in connection with paragraph 12.

If you wish to make a note of some of the Constitutional sources of military jurisdiction, the following are most frequently cited:

Grants to Congress:

Article I, Section 8, Clauses 1, 11, 12, 13, 14, 15, 16, 17, 18.

Grants to the President:

Article II, Section 2, Clauses 1 and 2
Section 3

Miscellaneous Grants of Power:

Article IV, Section 4

Fifth Amendment.

2 Exercise.--The first subparagraph restates the classic instance of the exercise of military jurisdiction enumerated by Chief Justice Chase in his dissenting opinion in Ex parte Milligan, 4 Wall 2; 18 L Ed 281, 287. To the three examples enumerated in that case; namely, military government, martial law, and military law, there has been added in the text a fourth category--the exercise of military jurisdiction by a government with respect to offenses against the law of war. This does not fall under any of the categories enumerated by Chief Justice Chase although it has existed as an exercise of military jurisdiction for years. For instance, Captain Wirtz, the Confederate Commandant of Andersonville Prison was tried and hanged for war crimes committed against Union prisoners of war. See also the modern cases, Ex parte Quirin, 317 U.S. 1; In re Yamashita, 327 U.S. 1, and the various war crimes cases which were not incidents of military government, martial law, or military law proper.

As for the exercise of military jurisdiction by the war courts military commissions, and provost courts--it may be recalled that the 1949 Manual provided:

> "These tribunals are summary in nature, but so far as not otherwise provided have usually been guided by

> the applicable rules of procedure and of evidence prescribed for courts-martial."

The 1951 Manual on the other hand provides:

> "Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, these tribunals will be guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial."

This change was made in anticipation of the ratification of the Geneva Convention of August 12, 1949 which will alter to a material extent the procedures heretofore applied by military commissions, particularly with respect to the trials of war criminals. Under the present Geneva Convention military war criminals are not entitled to be treated as prisoners of war. However, Article 85 of the new Geneva Convention Relative to the Treatment of Prisoners of War provides:

> "Prisoners of war prosecuted under the law of Detaining Powers for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

Among these benefits is Article 102 which provides:

> "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts, according to the same procedure as in the case of members of the armed force of the Detaining Power and, if, furthermore the provisions of the present chapter have been observed."

It would thus appear that unless we are willing to try our own personnel who commit war crimes by military commissions under a more summary procedure than that provided for courts-martial and under civil law rules of evidence--we will have to try enemy prisoners of war accused of war crimes under the same procedure as that prescribed for courts-martial.

Irrespective of whether we use our own court-martial procedure or a more summary one, certain of the safeguards afforded by the Convention exceed those prescribed by the Code and the Manual. Examples:

(1) Under Article 87 a prisoner of war cannot be deprived of his rank nor can there be any mandatory punishment prescribed.

(2) Escape may be treated only as a disciplinary infraction treated under the Articles of the Convention pertaining to disciplinary punishment.

(3) Article 101 prescribes a substantial waiting period before a death penalty may be executed.

(4) Article 103 makes it mandatory that an accused be credited with pretrial confinement on the execution of any sentence to confinement.

(5) Article 105 prescribes considerably longer time for a prisoner of war to prepare for trial than accorded under the code.

These conventions have not yet been ratified, but their ratification in some form is likely. For this reason the text of this paragraph was so drafted that it will not become obsolete and misleading if and when the new conventions are ratified.

In the event the conventions are not ratified, the President or other competent authority may prescribe other procedures consistent with the present Geneva Convention. In the absence of regulations by the President or other competent authority the trial procedure before military commissions will be that prescribed in the Manual. Existing regulations promulgated by military governors will not be affected until the conventions are ratified.

The next two agencies through which military jurisdiction is exercised--courts-martial and commanding officers--will be the subject of detailed discussion in other conferences.

The last agency discussed is Courts of Inquiry. In this subparagraph the President has delegated the power to promulgate regulations dealing with courts of inquiry to the several Secretaries.

CHAPTERS II AND III

JURISDICTION OF COURTS-MARTIAL

3 Article 16 and this paragraph will give very little pause for reflection to Army and Air Force personnel. We have the same three kinds of courts-martial. The Navy and Coast Guard will note immediately that the term "deck court" has disappeared. The deck court has been redesignated the "Summary Court-Martial." This may cause some confusion for a while as that term has heretofore been applied in the Naval service to the intermediate court which is now known as the "Special Court-Martial." The composition of these courts-martial will be covered in a later conference.

Our next topic is --Who may convene these courts.

5 Convening authority of General Court-Martial.--At the outset I would like to point out that the term "appointing authority" is no longer used and the statutory language of "convening authority" is used throughout the book. Similarly, the old Army term "reviewing authority" has acquired an entirely different meaning and now pertains to all authorities

who review courts-martial; it is not limited to the officer who convened the court or his successor in command.

Under Article 22 both the President and the Secretary of a Department are empowered to convene general courts-martial (Article 22a(l)(2)). Both are empowered to authorize commanding officers other than those enumerated in Article 22 to convene general courts. Although existing authorization by the President to appoint General Courts-Martial will remain effective after 31 May 1951, it is contemplated by each armed force that new orders will be promulgated empowering commanding officers of certain commands to convene such courts. Army and Air Force personnel will note that the power to convene general courts-martial is no longer vested in a commanding officer simply because there is assigned to his staff, a staff judge advocate, as was heretofore provided under Article of War 8.

In paragraph 5a(2) it is provided that when general court-martial jurisdiction is conferred on a commanding officer because he is empowered by the President or designated by the Secretary to convene general courts-martial, the convening order will cite such authorization. This is a new provision for the Army and Air Force which was taken from Section 329, Naval Courts and Boards.

It is to be emphasized that this is a procedural requirement for the convenience of those charged with the review of court-martial records. Its omission does not affect the jurisdiction of the court, although such an omission would be a violation of one of the President's procedural regulations.

In this connection it is to be noted that the Manual contains no provision similar to that now found in Section 327, Naval Courts and Boards which provides:

> "As Naval courts-martial are courts of limited jurisdiction, their records must show affirmatively that they have authority to hear and

> determine cases coming before them for trial."

This provision was not used in view of the Supreme Court's Decision in Givens v. Zerbst, 255, U. S. 11, wherein it was held that as long as a jurisdictional fact exists it may be proved upon collateral attack even though such jurisdictional fact may not appear in the record of trial by court-martial. As a matter of fact one of the points in Givens v. Zerbst was the failure of the record or convening order to show that a post commander had been empowered by the President to convene general courts.

The Navy has applied the rule of Givens v. Zerbst in a case where a jurisdictional fact which in fact existed was omitted from the record (CMO No. 1, 1942, page 124). The Army has long applied this rule (CM 195867, Jones, 2 BR 307).

Paragraph 5a(3) and (4) bring us to a discussion of the accuser's ineligibility to convene a court-martial for the trial of an accused. The Army and the Air Force will find that the term "accuser," as defined in Article 1(11) apparently combines the former concept of "accuser" and "prosecutor," as used in Article of War 8.

Under the code an accuser is:

> (1) A person who signs the charges; or
>
> (2) A person who directs that charges nominally be signed and sworn to by another; or
>
> (3) Any other person who has an interest, other than an official interest, in the prosecution of the accused.

This will not effect any radical change in Army and Air Force practice, but it will affect, to some extent, the mast procedures of a commanding officer of a Naval vessel. Major Hodson will discuss these matters further at a later conference.

In paragraph 5a(4) it is stated that whether a person who has not signed the charges is the accuser, is a question of fact. Purely official action is not, ordinarily, sufficient to make a commander an accuser. For example: A commander may without becoming an accuser direct a subordinate to investigate an alleged offense with a view to formulating such charges as the result of the investigation may warrant. He cannot, however, without becoming an accuser, order a subordinate to prefer certain specific charges.

Paragraph 5a(6) carries over the provisions of paragraph 5a, MCM, 1949 relative to the control which a convening authority may lawfully exercise with respect to courts. See Article 37. It is to be noted that the convening authority's power to withdraw charges from a court at any time prior to findings is unlimited. However, if he withdraws charges after evidence on the merits has been received, he is likely to find that jeopardy has attached unless the proceedings are terminated on motion of the accused or for manifest necessity in the interest of justice. See Article 44c; paragraph 56, and paragraph 68d.

5b Convening authority of Special Court-Martial.--The first subparagraph invites attention to Article 23a which lists the commanding officer eligible to convene special courts-martial. The reference to "officers in charge" as used here and elsewhere in the Manual has no application to the Army and the Air Force and pertains exclusively to the Naval service and the Coast Guard.

If you have had occasion to read the House hearings you may remember that there was much discussion about preserving the authority of Coast Guard warrant officers and petty officers who are "officers in charge" in that armed force. The legislative history shows the intent of the House Committee to include such warrant and petty officers within the term "officers in charge" in view of the fact that many isolated stations are commanded by such noncommissioned officers in charge. Of course such person will not be

authorized by the Secretary of the Treasury to convene any kinds of courts-martial. Obviously there is no occasion for a petty officer to convene a court-martial composed of commissioned officers. However, the Coast Guard may authorize such petty "officers in charge" to exercise limited powers under Article 15.

Article 23a(3) confers special court-martial jurisdiction on a commanding officer of a "detached battalion" or corresponding unit of the Army. Article 23a(4) confers such jurisdiction on a commanding officer of a "separate squadron" of the Air Force; and Article 23a(6) confers such jurisdiction on the commanding officer of any "separate or detached command or group of detached units of any of the armed forces placed under a single commander for the purpose." In paragraph 5b(3) there is a discussion of what is meant by the terms "separate" and "detached." It is made clear that these terms are used in a disciplinary sense, not in a tactical, administrative, or physical sense. Thus, a detached command for the purpose of convening special courts-martial may be physically located across the road from a higher headquarters and still be considered detached. Conversely a unit may be detached for tactical purposes, be located miles away and still not be a detachment in the sense of Article 23.

In the Army and in the Air Force any question as to whether a unit is or is not a detached command will be finally determined by the officer exercising general court-martial jurisdiction over the command. In the Navy and the Coast Guard any such question will be finally determined by the flag or general officer in command or by the senior officer present who designated the detachment.

5c Convening authority of Summary Court-Martial.-- Paragraph 5c does not effect any substantial change for the Army or the Air Force. As was heretofore the case, an accuser is not ineligible to convene a summary court-martial or to act as a summary court. However, unless the convening authority is the only officer with a command, he must appoint

a subordinate as a summary court. This is a departure from the present Naval practice. Section 692, Note 2, NC & B, provides in part:

> "An officer empowered to order deck courts may at his discretion designate himself as deck court officer, irrespective of his rank, if commissioned, and irrespective of the rank of other officers attached to his command."

The provision of Article 24, which was derived from Article of War 10, permits the convening authority to designate himself as the summary court only when he is the only person present with the command.

CHAPTER IV

JURISDICTION OF COURTS-MARTIAL

8 Source, nature, and requisites of court-martial military jurisdiction.--The scope of this paragraph follows generally that of paragraph 7, MCM 1949. The matters covered in Section 329, NC & B, as to Convening Authorities are found in paragraph 5; matters dealing with the composition of courts and their personnel (Section 330, NC & B) are discussed in paragraphs 4 and 6. The Statute of Limitations (which is not a jurisdictional matter), now discussed in section 332, NC & B will be found in paragraph 68.

You will note that the familiar quotation from Grafton v. United States appears in the third subparagraph of 8. This expresses the doctrine that court-martial judgments are not subject to review by civil tribunals except on the sole question of whether the court had jurisdiction. In the last 5 or 10 years there has been a concerted drive to enlarge the scope of collateral review on the theory that a deprivation of due process during the proceedings divests a court-martial of jurisdiction.

Among the lower court cases which have applied this theory to the extent of granting relief are Hicks v. Hiatt, 64 F. Supp. 328 and Shapiro v. U. S., 107 Ct C1 650; 69 F. Supp. 205. This theory is difficult to square with the established doctrine that jurisdiction to decide includes jurisdiction to make a wrong as well as a right decision, (Fauntleroy v. Lum, 210 U. S. 230, 234, 235; Pope v. U. S., 323 U.S. 1, 14). As pointed out by the Supreme Court in Carter v. McClaughry, 183 U. S. 636:

> "* * * the sentences of court-martial, when affirmed by the military tribunals of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely because voidable because of the defective exercise of the power possessed."

It would, therefore, appear that a court which initially has jurisdiction does not lose jurisdiction by making an error. The sound view in the Grafton and Carter cases was reaffirmed by the Supreme Court on 13 March 1950 in Brown v. Hiatt, 339 U. S. 103, 110 wherein Mr. Justice Clark stated for the court:

> "The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy

> of the pretrial investigation, and the competence of the law member and defense counsel. * * * It is well settled that 'by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. . . The single inquiry, the test, is jurisdiction.' In re Grimley, 137, U.S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."

This is strong language, but lest we be inclined to relax too much in the security of our citadel, I must invite your attention to the language of Mr. Justice Douglas in Whelchel v. McDonald, 340 U.S. 122, decided on December 4, 1950 in which he said:

> "We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts."

This seems again to open the door of the citadel to the assault of those who believe that a procedural deviation of a court-martial might affect the jurisdiction of the court and deprive it of jurisdiction. The moral seems to be that so long as the military services accord accused persons a fair trial according to military due process, the Supreme Court will adhere to its traditional view as to the scope of collateral review of court-martial judgment; but if it finds a series of cases which shocks its conscience, it may adopt another approach to the problem.

In the last subparagraph the provisions of Article 76 with respect to finality of court-martial judgments are restated. This is comparable to the language of Article of War 50h and the last provision in Article of War 53.

The Army and Air Force have never taken the view that the finality of court-martial judgments as provided in the Articles of War operates to preclude collateral attack on jurisdictional grounds. This view has recently been specifically affirmed by the Supreme Court in Gusik v. Schilder, 340 U.S. 128, decided on 4 December 1950. The Gusik case also stands for the proposition, which you will find in paragraph 214b, to the effect that the Federal courts will not entertain petitions for a writ of habeas corpus until the accused has exhausted his military remedies for an appeal and for a petition for a new trial.

In the fifth subparagraph it is stated that jurisdiction does not in general depend upon where the offense was committed. To this proposition there is an apparent qualification. If an offense were triable by court-martial only under the Crimes and Offenses not Capital clause of Article 134, such offense must have been committed within the boundaries of the jurisdiction in which the act is a crime.

In this paragraph it is also stated that jurisdiction as to offenses against military law is not affected by the place where the court sits. Thus a court-martial does not have to sit or remain within the Territorial command of the convening

authority. See Durant v. Hiatt, 81 F. Supp. 948, affirmed 177 F. 2d 373. It might also happen that the personnel of a court will be transferred from the command of the officer who convened the court after a case had been referred to it for trial. This also does not divest the court of jurisdiction. See CM 316193, Holstein, 65 BR 271, 275.

A different problem may be presented in those cases in which a general court-martial derives its jurisdiction under the law of war as a substitute for a military commission. Such a tribunal, particularly when it sits as a substitute for a local court in enforcing the law of occupied territory, is generally required to sit in such occupied territory. If it enforces the law of war it is generally required to sit in the theater of war or in the country in which the offense took place. This rule will be perpetuated by Article 66 of the Geneva Convention of 12 August 1949 relative to the protection of civilians. Compare, however, with Ex parte Quirin, 317, U. S. 1.

Before going to the next subject, I would like to invite the attention of the Navy officers to the omission of the provisions of Section 327, NC & B, which provided:

> "A particular court-martial has authority to try men specifically ordered by it and has no authority to try a man ordered tried before another court."

The Army Boards of Review have consistently held that approval of a sentence by the proper convening authority effects a ratification of the trial by a court other than one to which the case had been referred. Thus if charges are tried by Court B, although they had...

* * *

APPENDIX C

Department of Defense

Military Commission Order No. 1

August 31, 2005

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References:
(a) United States Constitution, Article II, Section 2
(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order")
(c) DoD 5200.2-R, "Personnel Security Program," current edition
(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)
(e) Section 603 of title 10, United States Code
(f) DoD Directive 5025.1, "DoD Directives System," current edition
(g) Military Commission Order No. 1 (March 21, 2002)

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military

commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials. This Order supersedes reference (g).

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the Presiding Officer, other members, and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission except sessions with members deliberating and voting on findings and sentence and sessions conducted by the Presiding Officer under Section 4(A)(5)(a), but the absence of an alternate member shall not preclude the Commission from conducting proceedings. Alternate members shall attend deliberations on matters other than findings or sentence, but may not participate in such deliberations or in any voting. In case of incapacity, resignation, or removal of any member, an alternate member, if available, shall take the place of that member, in the sequence designated by the Appointing Authority. Any vacancy among the members or alternate members occurring after a trial has begun may, but need not, be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) Number of Members

Each Commission shall consist of a Presiding Officer and at least three other members, the number being determined by the Appointing Authority. For each such Commission, the Appointing Authority shall also appoint at the outset of proceedings one or more alternate members, the number being determined by the Appointing Authority.

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved.

The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

The Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings. The Presiding Officer may conduct hearings (except hearings on the admissibility of evidence under Section 6(D)(1)) outside the presence of the other members for the purposes of hearing and determining motions, objections, pleas, or such other matters as will promote a fair and expeditious trial. If the Presiding Officer determines that deliberations are necessary to resolve a challenge by another member under Section 6(D)(1) to a ruling by the Presiding Officer on the admissibility of evidence, the Presiding Officer shall deliberate and vote with the other members to determine the admissibility of the evidence in question. The Presiding Officer shall not deliberate or vote with the other members on findings or sentence, nor shall the Presiding Officer be present at such deliberations or votes.

(b) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(c) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before

any other Commission convened under this Order.

(d) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(e) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(f) As soon as practicable at the conclusion of each Commission session, the Presiding Officer shall transmit an authenticated copy of the proceedings to the Appointing Authority.

(6) Duties of the Other Members

The other members of the Commission shall determine the findings and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1).

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;

(b) To conduct the prosecution before the Commission of all cases referred for trial; and

(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without

regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Chief Defense Counsel may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the

subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an ad hoc basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense

Counsel shall be herein referred to collectively as "the Defense."

D. Other Personnel

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

B. The Accused shall be presumed innocent until proven guilty.

C. A Commission member, other than the Presiding Officer, shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).

E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be

consistent with Section 6(D)(5) and subject to Section 9.

F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused shall be present at every stage of the trial before the Commission, to the extent consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Presiding Officer for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Presiding Officer will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and the Commission will be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;

(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(c) Require the production of documents and other evidentiary material; and

(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in

Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the

Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time authorized by the Presiding Officer.

C. Oaths

(1) All members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission) the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Presiding Officer on his own initiative, or if requested by other members of the Commission, may also summon and hear witnesses. The Presiding Officer may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may submit written questions to the Presiding Officer for the witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera*

presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Presiding Officer may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested. The Presiding Officer shall inform the other members of any facts conclusively noticed under this provision.

(5) Protection of information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the President's Military Order and this Order, including to safeguard 'Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement

sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera*, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel. The Accused and the Civilian Defense Counsel shall be provided access to Protected Information falling under Section 5(E) to the extent consistent with national security, law enforcement interests, and applicable law. If access to such Protected Information is denied and an adequate substitute for that information, such as described above, is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value under Section 6(D)(1), shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to

the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission, other than the Presiding Officer, deliberate and vote on findings in closed conference, the senior-ranking member who voted on findings shall announce the Commission's findings in the presence of the entire Commission, the

Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission, other than the Presiding Officer, deliberate and vote on a sentence in closed conference, the senior-ranking member who voted on a sentence shall announce the Commission's sentence in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

In accordance with instructions from the Presiding Officer, the other members of the Commission shall deliberate and vote in closed conference. Such a Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the other members is required for a finding of Guilty. When

appropriate, the other members of the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the other members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the other members. Votes on findings and sentences shall be taken by secret, written ballot. The Presiding Officer shall not participate in, or be present during, the deliberations or votes on findings or sentence by the other members of the Commission.

G. Sentence

Upon conviction of an Accused, in accordance with instructions from the Presiding Officer, the other members of the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the other members of the Commission shall determine to be proper. Only a Commission that includes at least seven other members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the

Presiding Officer for authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance

from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within seventy-five days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish

such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

8. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments,

agencies, or other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT

The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.

/s/

Donald H. Rumsfeld
Secretary of Defense

APPENDIX D

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS
Before the
MILITARY COMMISSION TO TRY PERSONS
CHARGED WITH
OFFENSES AGAINST THE LAW OF WAR AND THE
ARTICLES OF WAR

Washington, D.C.
Wednesday, July 8, 1942

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STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS
Before the
MILITARY COMMISSION TO TRY PERSONS
CHARGED WITH
OFFENSES AGAINST THE LAW OF WAR AND THE
ARTICLES OF WAR

Washington, D.C.
Wednesday, July 8, 1942

The Military Commission appointed by the President by order dated July 2, 1942, met, in room 5235 Department of Justice, at 10 o'clock a.m., to try for offenses against the Law of War and Articles of War, the following persons: Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich

Harm Heinck, Edward John Kerling, Herman Neubauer, Richard Quirin and Werner Thiel.

PRESENT: Members of the Military Commission, as follows:

Major General Frank M. McCoy, President,
Major General Walter S. Grant,
Major General Blanton Winship,
Major General Lorenzo D. Gasser,
Brigadier General Guy V. Henry,
Brigadier General John T. Lewis,
Brigadier General John T. Kennedy.

As Trial Judge Advocates:

Honorable Francis Biddle,
Attorney General of the United States.
Major General Myron Cramer,
The Judge Advocate General, U.S. Army.
Colonel P. Granville Munson,
Colonel John M. Weir,
Colonel Erwin M. Treusch.
Officers of the Judge Advocate General's Department.
Oscar Cox,
Assistant Solicitor General of the United States.
James H. Howe, Jr.,
Assistant to Attorney General.

As Provost Marshal:

Brigadier General Albert L. Cox.

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As Counsel for the Accused except George John Dasch:

Colonel Cassius M. Dowell,
Colonel Kenneth Royall,

Major Lauson H. Stone,
Captain William G. Hummell.

As Counsel for the Accused George John Dasch:
Colonel Carl L. Ristine.

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PROCEEDINGS

The President. The Commission will come to order.

The Commission is now open for the trial of such persons as may be brought before it.

Brigadier General Cox. Bring in the prisoners.

(The prisoners were brought into the room.)

Colonel Munson. May it please the Commission: The prosecution is ready to proceed with the trial in the case of the United States against Ernest Peter Burger, George John Dasch, Herbert Hans Haupt, Henry Hans Heinck, Edward John Kerling, Hermann Otto Neubauer, Richard Quirin, and Werner Thiel.

The reporter will be sworn.

(The oath was administered to the reporter, Mr. Francis J. Attig, as follows:)

Colonel Munson. Do you swear that you will faithfully perform the duties of a reporter to this Commission, so help you God?

Mr. Attig. I do.

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Colonel Munson. I am directed by the Trial Judge Advocates to name the following men to this honorable Commission. The Trial Judge Advocates nominate and request your honorable body to accept as assistant trial judge

advocates the following named officers of the Department of Justice; Oscar Cox, Assistant Solicitor General of the United States, and James H. Rowe, Jr., Assistant to the Attorney General.

Will those gentlemen rise, please, so that they may be identified?

(Mr. Cox and Mr. Rowe rose.)

Colonel Munson. And also the following named officers of the United States Army: Colonel F. Granville Munson, now addressing the Commission; Colonel John M. Weir, and Colonel Erwin M. Treusch; all being officers of the Judge Advocate General's Department of the Army.

Will they be accepted as assistant trial judge advocates?

The President. They will be accepted.

Colonel Royall. May it please the Commission: Before the defense counsel take any part or are recognized in this matter, we desire to make a statement to the Commission.

The President. Is that in order, as far as the prosecution is concerned?

Colonel Munson. Yes.

The President. It will be received.

Colonel Royall. In deference to the Commission and in order that we may not waive for our clients any rights which may belong to them, we desire to state that, in our opinion, the order of the President of the United States creating this court is invalid and unconstitutional. I do not think it

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necessary or appropriate to argue that question unless I am so requested.

It is perhaps sufficient to state that our view is based, first, on the fact that the civil courts are open in the territory in which we are now located and that, in our opinion, there are civil statutes governing the matters to be investigated.

In the second place, we question the jurisdiction of any court except a civil court over the persons of these defendants.

In the third place, we think that the order itself violates in several specific particulars congressional enactments as reflected in the Articles of War.

The President. Are there any remarks on the part of the Prosecution?

The Attorney General. I do not want to argue the case, but if at the appropriate time you wish to hear argument on it, I should like to be heard. May I simply make a very brief statement in answer to Colonel Royall's remarks?

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants.

In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.

Thirdly, this is not a trial of offenses of law of the civil courts but is a trial of the offense of the law of war, which is not cognizable to the civil courts. It is the trial,

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as alleged in the charges, of certain enemies who crossed our borders, crossed our boundaries, which had then been described by the military and naval authorities, and who crossed in disguise in enemy vessels and landed here.

They are exactly and precisely in the same position as armed forces invading this country. I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should not be met by the resistance of the Army itself under the Commander-in-Chief or that they have any civil rights that you can listen to in this proceeding.

Colonel Royall. May I say in reply, sir, that the entire rank of the corps or the President of the United States does not, in our opinion, affect the matter in any way, and it is needless to say to this Court that we are basing our position in no sense upon the personnel of the Court or any lack of confidence that we have in it.

Colonel Ristine. If the Commission please, on behalf of the one prisoner—

The President. I take it you are Colonel Ristine?

Colonel Ristine. Yes, sir.

The President. Representing the one prisoner by name?

Colonel Ristine. Representing the one. May I request that the objections urged by defense counsel be equally applicable to that prisoner, George John Dasch?

The President. Colonel Ristine, Mr. Reporter, has been directed by competent authority to represent that particular prisoner, and the Commission has been so informed by such authority.

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Colonel Dowell. Another comment by defense counsel, if the Commission please: The purpose of these remarks at this time is merely to ward off any assumption that the defense accepts by participating in this proceeding the legality of the tribunal or of its method of constitution.

The President. Does the prosecution care to remark on these statements of the defense counsel?

The Judge Advocate General. No, sir.

The President. It is the opinion of the Court that before any decision in the order of instance be passed on by the Commission, the Commission shall be sworn and organized. I might state in this connection that the Commission will hold its proceedings in secret; that those present will be limited to the proper officials of the prosecution and of the defense; and that they will all be sworn, as well as such officials as may be present on the request of the prosecution and the defense,

subject to the decision of the Court as to the propriety of their entrance; and that there will be no spectators of any character or kind admitted to the sessions of this Court or Commission.

Since the procedure as to order of instance will be that followed in military courts in general, we shall now proceed to the swearing of the Court and those present before taking action on your request.

Colonel Munson. May it please the Commission: The defense counsel requests me to ask your honorable body to accept as assistant defense counsel the following named officers of the Army of the United States: Major Lauson H. Stone.

(Major Stone rose.)

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Colonel Munson. Captain William G. Hummell.

(Captain Hummell rose.)

Colonel Munson. With respect to those present, do I understand the order of the Commission to cover the officers of the Federal Bureau of Investigation, who are necessary in the conduct of the case, and such assistants as the Attorney General may desire to aid him in the prosecution of the case, without naming those officers specifically?

The President. That is correct.

Colonel Munson. That is correct, sir.

The President. I shall ask you to name them to the officer at the door. I shall ask you to present to Lieutenant Page, representing the Provost Marshal, at the door, a list of those authorized, so that they may be passed in and out properly and expeditiously.

Colonel Munson. Two copies of the record will be furnished the defense under the terms of the order.

I shall now read the order appointing this military commission.

Commander-in-Chief of the Army and Navy

Washington, D. C. July 2, 1942.

By virtue of the authority vested in me as President and as Commander-in-Chief of the Army and Navy, under the Constitution and Statutes of the United States, and more particularly the Thirty-Eighth Article of War (U.S.C. Title 10, Sec. 1509)—

The latter, I may interpolate, standing for United States Code, Title 10, 1509—

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I, Franklin Delano Roosevelt, do hereby appoint as a Military Commission the following persons:

Major General Frank R. McCoy, President
Major General Walter S. Grant
Major General Blanton Winship
Major General Lorenzo D. Gasser,
Brigadier General Guy V. Henry
Brigadier General John T. Lewis
Brigadier General John T. Kennedy

The prosecution shall be conducted by the Attorney and the Judge Advocate General. The defense counsel shall be Colonel Cassius M. Dowell and Colonel Kenneth Royall.

The Military Commission shall meet in Washington, D.C., on July 8th, 1942, or as soon thereafter as is practicable, to try for offenses against

the Law of War and the Articles of War, the following persons:

Ernest Peter Burger
George John Dasch
Herbert Hans Haupt
Henry Harm Heinck
Edward John Kerling
Hermann Otto Neubauer
Richard Quirin
Werner Thiel

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the

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matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for the conviction or sentence. The record of the trial including any judgment or sentence shall be transmitted directly to me for my motion thereon.

FRANKLIN D. ROOSEVELT

The White House,
July 2, 1942.

All the members of the Commission named therein are present, to wit: Major General McCoy, Major General Grant, Major General Winship, Major General Gasser, Brigadier General Henry, Brigadier General Lewis, and Brigadier General Kennedy.

The accuser in this case is Colonel F. Granville Munson, United States Army. The charges were forwarded to the Trial Judge Advocates of this Commission by letter of The Adjutant General, dated July 6, 1942, pursuant to the order of the Secretary of War, which will be read later.

No member of this Commission is to be called as a witness for the prosecution, and no cause for or ground of challenge of any member of this Commission is known to the prosecution.

Is any member of this Commission aware of any facts which he believes to be a ground for challenge by either side? If so, please state those facts.

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The President. There seem to be none.

Colonel Munson. The prosecution has no challenges.

The President. Lieutenant Page, please permit nobody to leave the court or to enter until further instructions. I will make an exception for any who have heretofore been sworn.

For the moment I will ask you to carry out my previous instructions--that nobody will be allowed to leave or enter until further instructions.

(The oath was administered to the reporter, Mr. N. J. Cinciotta, as follows:)

Colonel Munson. Do you swear that you will faithfully perform the duties of a reporter to this Commission, so help you God?

Mr. Cinciotta. I do.

Colonel Munson. Do the accused or their counsel desire to challenge any member of this Commission for cause?

Colonel Royall. May it please the Commission, on account of the unusual nature of the proceeding, and because of the short time that we have had to investigate this matter, if the Commission will permit us, with all deference, of course, to the individual members of the Commission, we would like to ask the Commission as a body a few questions to determine whether or not we will challenge anyone, if that is permissible.

The President. I would like to ask the Judge Advocate General of the Army whether he thinks the proceedings would more properly, on this plea, follow the organization of the Commission with regard to swearing the Commission and counsel and those present.

The Judge Advocate General. I do not believe, sir, that

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I understand just what you mean. Do you mean to swear the Commission first?

The President. That was the question I was asking, whether we should be sworn and organized prior to acting on these objections and pleas.

The Judge Advocate General. No, you should not, sir.

The President. In other words, we should act without further organization of the Commission?

The Judge Advocate General. Yes, sir.

The President. Has the defense any comment on that?

Colonel Royall. Our view of it would be this, sir; that on the question of challenge that should be disposed of before the Commission is organized. I think that is the normal and proper procedure. As to any other matters, I should think the Commission would have to be organized and sworn.

The President. It seems to me, then, that the Commission should act on your challenge. I take it there is a challenge to the jurisdiction.

Colonel Royall. There is a challenge to the jurisdiction. If the Commission desires my opinion, I think that any action

taken by the Commission as a Commission would have to be taken after you are sworn. But the question of challenge, if I understand the Court Martial Manual, is normally disposed of before the Commission is sworn.

I think that is correct, is it not?

Colonel Munson. That is correct. That is provided for in the 57th paragraph of the present Manual for Courts Martial. Does the Commission desire me to read it?

The President. The Commission is familiar with that. I

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just wanted the comment of the Judge Advocate General.

Colonel Royall. I am not making any motion at this time directed to the Commission. My request is that I be permitted to make certain inquiries of the Commission to determine whether or not we think there should be a challenge for cause. That is the request I make.

The President. In other words, this is related to your first challenge?

Colonel Royall. The challenge for cause, not peremptory. We will come to that later. We have not been advised yet what is to be done about that. But as to the challenge for cause, I desire to ask the Commission some general questions, and if these general questions develop any situation peculiar to an individual member of the Commission, I desire to pursue that by further inquiry of the Commission, if that is appropriate.

The President. We will consider that.

Has the prosecution any further remarks on the questions posed by the defense?

The Judge Advocate General. The procedure is a little unusual. The challenging side customarily presents the ground of its challenge, and then the challenged member of the Commission or the Court, in the ordinary court martial, states his position or familiarity with the case. However,

under the circumstances of this case, I see no serious objection to the procedure requested.

The President. The Commission will grant your motion.

Colonel Royall. I would like to say that, in view of the great newspaper publicity that has been given to this matter, in spite of efforts to suppress it, I wish to inquire whether

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any member of the Commission has to any degree the feeling that the circumstances under which the Commission is appointed would make it difficult or embarrassing for him to reach a judgment in favor of the defendants in the event the evidence should so indicate.

I hear no answer, and I assume there is no such--

The President. Well, we are just considering the question.

Colonel Royall. I see, sir.

The President. I will give you the answer.

Colonel Royall. Yes, I see.

The President. There seems to be unanimity of opinion in the answer "no" to your question.

Colonel Royall. Giving weight, of course, to the fact that there are certain elements of the offenses charged which differ in times of peace and times of war, an element to which the Commission can properly give consideration, I ask the members of the Commission if, aside from those legal considerations, the fact that this trial is being conducted in time of war would in any manner incline the Commission to deal more harshly with the defendants in the matter of conviction or sentence than they would if it were in time of peace.

The President. I do not consider it a proper question. The Commission does not consider that a proper question to consider.

Colonel Royall. We have no other questions to ask.

The defense has no challenges for cause.

Colonel Munson. Is any challenge, may I ask the Commission, peremptorily to be allowed?

The President. The question has not been decided, as I

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take it, on the motion before the Commission of a challenge to the general jurisdiction of the Commission. That has not been decided yet.

Colonel Dowell. May it please the Commission: The defense has presented nothing further, in that connection, than merely to go on record as not admitting the constitutionality of the validity of this Commission or the method of its appointment by proceeding to participate in the trial. No motion has been intended to be made at this time whatever.

The President. There seems to be nothing for the Commission to pass on, then, beyond the making of record the statements of the opposing sides. So I will instruct the procedure of the organization of the Commission to go ahead.

Colonel Munson. Is any challenge of a peremptory nature to be permitted?

The President. We will not act on that unless there is some challenge before the Commission.

Colonel Dowell. The defense would like to exercise its right to one peremptory challenge.

Colonel Munson. The prosecution, I think, questions the right of the defense to phrase the statement in that manner--that it has a right to one peremptory challenge.

The President. The Commission will hear the discussion on that, if any is desirable, by the Attorney General.

The Attorney General. It is a matter of right, of course, for you to decide on, and under the powers given you by the President, it is perfectly clear that you can refuse any peremptory challenges. That is our view as a matter of law of

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be received in evidence by the Commission.

The President. Is there anything further, Mr. Attorney General?

The Attorney General. I have no further argument on this subject with respect to counsel's objection.

The President. If there is no objection on the part of any member of the Commission, the objection of the defense counsel is not sustained.

(Public proclamation No. 1 was marked Exhibit p-11 and received in evidence)

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The Attorney General. The prosecution offers in evidence Exhibit P-12. This exhibit is a certified copy of a chart showing the areas comprising the Eastern sea frontier and the Gulf sea frontier as they existed during the period of June 12 to June 18, inclusive. It is certified by the Chief of Staff and attested by the Secretary of the Navy. It is marked "Confidential," and I take it that the chart itself is confidential.

I also offer in connection with this exhibit a separate paper, which is, however, really a part of the exhibit, marked as Prosecution Exhibit 12-1/2, which describes by metes and bounds the area of the territory shown on the map. I have shown these to counsel for the defense.

The President. I take it that these are in connection with both the naval and the military defense areas, are the not?

The Attorney General. Yes.

Colonel Royall. The defense desires to object to that upon grounds similar to those stated in the case of the other paper but not on the ground of identification or authentication.

The President. I take it on the ground of relevancy?

Colonel Royall. That is right, sir--relevancy and materiality.

Colonel Dowell. The defense offers another observation. I believe that the Attorney General mentioned the southern and eastern zones, whereas I believe the map shows the entire United States divided into defense commands.

The Attorney General. Well, I quoted the words of the proclamation.

Colonel Dowell. He meant especially the southern and eastern.

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The President. Subject to objection from any member of the Commission, the objection of the defense is not sustained, and the papers will be accepted in the record.

(Certified copy of chart showing areas comprising Eastern sea frontier and Gulf sea frontier as they existed during the period from June 12 to June 18, inclusive, and paper describing territory shown on map were marked as Exhibits P-12 and P-12-1/2, respectively.)

Colonel Royall. I should like to say to the Commission that ordinarily when documents are introduced, particularly if they are voluminous and we are not familiar with them, we should like to have them read. I think that that is our privilege. It was not our intention, as I so informed the Attorney General, to have this first proclamation read. However, since the second is so closely related to it and covers the entire country, and since we are not familiar with it and, I assume, the Commission in its entirety is not, I believe we would prefer this to be read.

The President. Will you please have it read at the request of the defense counsel?

Mr. Cox. Exhibit P-11 reads as follows:

> Headquarters Eastern Defense Command and First Army,
>
> Governors Island, N.Y.
>
> Public Proclamation No. 1.
>
> To: The people within the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, part of the State of Florida, and the District of Columbia.
>
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> Whereas, by virtue of orders issued by the War Department on December 20, 1941, and March 18, 1942, that portion of the continental United States east of the following line: The Ohio-Pennsylvania boundary, the West Virginia-Virginia boundary, the Kentucky-Virginia boundary, the Tennessee-Virginia boundary, the Tennessee-North Carolina boundary, the Alabama-Georgia boundary to its junction with Florida thence south along the Apalachicola River, has been established as the Eastern Defense Command under my command; and
>
> Whereas, by Executive Order 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary

of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, with authority over such military areas as in such Executive Order prescribed; and

Whereas, the Secretary of War on April 22, 1942, designated the undersigned as Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Eastern Defense Command; and

Whereas, the Eastern Defense Counsel embraces fifteen States, part of another State, and the District of Columbia, inhabited by millions of loyal citizens of

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the United States and hundreds of thousands of persons not yet citizens of the United States, but equally loyal; and

Whereas, the economic life of this large portion of the population of our country, dwelling within the Eastern Defense Command, should be distributed as little as may be consistent with requirements of

adequate National Defense and internal security; and

Whereas, the Eastern Defense Command embraces the entire Atlantic Coast and a portion of the Gulf Coast of the United States and its geographical location is particularly subject to attack, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such hostile operations;

Now, Therefore, I, Hugh A. Drum, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Eastern Defense Command and First Army, charged with the defense of the Eastern seaboard, do hereby declare and proclaim that:

1. The present situation requires as a matter of military necessity the establishment, in the territory embraced in the Eastern Defense Command within the continental United States, of Military Areas, and for that purpose, I do hereby prescribe all of the territory in the several States of the

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United States lying east and northeast of the westerly boundary line of the

Eastern Defense Command, including the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, part of Florida, and the District of Columbia, to be a Military Area and to be designated as the Eastern Military Area, as the same is shown on the map.

2. The functional subdivisions of the Eastern Military Area for purposes of enforcement of restrictions and orders issued from this Headquarters are the existing Corps Areas, namely, the First Corps Area, with Headquarters at Boston, Massachusetts; the Second Corps Area, with Headquarters at Governors Island, New York; the Third Corps Area, with Headquarters at Baltimore, Maryland; and the Fourth Corps Area, with Headquarters at Atlanta Georgia. The Commanders of said Corps Areas are charged with responsibility for the enforcement of the restrictions and orders pertaining to their respective Corps Areas.

3. The protection of American commerce and that of the United Nations (sic) from damage or destruction by enemy attack, and the prevention of enemy action against our shores, along the Atlantic and Gulf

Seaboards, involve the effective control of artificial lighting along these coasts and for a reasonable distance in the rear thereof. For the purpose of such control, the existing restrictions and orders of the Commanding Generals of the four Corps Areas of

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the Eastern Military Area are hereby adopted and declared to be a part of this Proclamation. Corps Area Commanders are designed as the authorities to promulgate the necessary restrictions and orders for control.

4. Willful violation of any such restriction or order by an alien enemy, or repeated careless violations, even if not willful, are cause for expulsion, internment or prosecution; similar violations by persons other than alien enemies are cause for expulsion or prosecution.

5. Nothing contained herein shall be construed as limiting or modifying the duty and responsibility of the Department of Justice under the Proclamations of the President of December 7 and 8, 1941, insofar as the enforcement of rules and regulations for the conduct and control of alien enemies is concerned, or otherwise.

6. The Corps Areas in the Eastern Military Area, each within its respective sphere of activities, and such federal, state, municipal and local agencies, as the Commanding General,

Eastern Defense Command, with the consent of such agencies, may from time to time deem advisable specifically to designate, are hereby designated as the agencies to enforce the provisions of these restrictions and orders and such restrictions and orders and such restrictions and order as may subsequently be issued by him; and these agencies, under the coordination of the Commanding General, Eastern Defense Command, have jurisdiction to conduct the investigations

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necessary to their respective enforcement thereof.

7. In accordance with representations made to the Governors of the States within the Eastern Military Area and the Commissioners of the District of Columbia, it is specifically requested that state and municipal police, and other officials and civilians within the States affected by this Proclamation, assist the agencies charged with enforcing restrictions by reporting to them the names and addresses of all persons believed to have violated restrictions, and such other information as may be called for by these agencies.

8. A copy of this Proclamation shall be displayed for public inspection at every Selective Service Local Board; at every Post Office; at every Court House; and at every Town Hall

within the Eastern Military Area. Additional proclamations, announcements, restrictions, and orders will be issued from this Headquarters as occasion demands. Copies of such additional proclamations, announcements, restrictions, and orders will be available for inspection at every Selective Service Local Board; at every Post Office; at every Court House; and at every Town Hall within the Eastern Military Area. It shall be the duty of every person found within the Eastern Military Area to familiarize himself with the terms of every proclamation, announcement, restriction, or order issued by this Headquarters.

The assistance of public-spirited and patriotic newspapers, periodicals, radio and other media of public information within the Eastern Military Area is earnestly

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solicited and it is confidently expected that they will publish in full in a prominent position this Proclamation and every proclamation, announcement, restriction, or order issued by this Headquarters pursuant to this Proclamation.

H. A. DRUM,
Lieutenant General, U.S. Army,
May 16, 1942. Commanding.

Colonel Royall. May I say this: the Commission has ruled on it, and I assume it could not reconsider it if it desired. However, I desire to make this additional argument about the admissibility of that proclamation.

It plainly appears from that proclamation that nothing is contemplated as to the military administration of the law in that territory; on the contrary, it clearly and almost positively, certainly inferentially, appears that the civil authorities are designated to enforce the various restrictions which are imposed therein.

The President. I do not take it that you ask for reconsideration? You have simply made a statement?

Colonel Royall. I did not want to make formal request for reconsideration.

The Attorney General. I take it, then, that there is nothing for me to argue.

Colonel Royall. I should like to say this--and this is not what the Commission has addressed its remarks to: a moment ago the Commission stated that this was read at the request of the defense. Could we add: "without waiving its objection?"

The Attorney General. I have no objection to that.

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Colonel Royall. I think that that is appropriate. I would rather have it clarified.

The President. Yes.

The Attorney General. May I proceed?

The President. Yes.

The Attorney General. I will ask the reporter to mark this document as Prosecution Exhibit 13 and, since it consists of a number of pages, to identify each page by a letter.

May it please the Commission, I offer the prosecution's exhibits P-13-A to P-13-I, inclusive. It is all one exhibit, there being separate papers and that being the reason why they are lettered in that way.

This is confidential and is so marked by the Third Naval District. Accompanying it is a map of the coast of Long Island, showing the various Coast Guard stations and the directions to the Coast Guard stations which were in effect at that time.

I have shown this to counsel for the defense and now hand it to the Commission. I understand you wish to look at it.

Colonel Royall. We object to that on an additional ground. First, we object as in the other cases, because we do not think it is material or relevant. But we also object here because there is nothing on these papers to indicate that that was the condition at the time these offenses are charged to have been committed.

The date on the map shows March 20. In a hurried reading of it, I see nothing to indicate that that was the condition later.

We have not sought to raise captious objections or objections based merely on form. In the other instance there was a certificate from an officer that the condition was in effect on

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a date, and in such event I would not want to try to be technical in bringing the officer. But there is no such certificate here. There is nothing in those papers to indicate that the condition was in effect, so far as I can see from an inspection of them.

The Attorney General. Mr. President, if the Commission wishes, I can, of course, subsequently call Admiral Waesche or his assistant to prove these documents. I take it, however, that the ordinary rule of law is that where a document or a condition is in effect on a certain date and it is objected to on a date, and in such event I would not want to try to be technical in bringing the officer. But there the ground that it may not have been in effect at the time involved, it is up to

counsel making that objection to show that the order was not still in effect. It would be precisely as if an order issued June 1, with no other order issued thereafter, was objected to on the ground that it may have been thereafter not in effect. This is an order that is in effect; and for whatever relevancy they have, I think these papers are relevant, as I said before, and I think that the Commission should receive them. Should the President wish me, however, to call Admiral Waesche or his assistant, who, I think, certified these papers, I shall be very glad to do so tomorrow. It seems unnecessary; but, of course, that is a matter for the Commission to decide.

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